Supreme Court, U.S.
FILED

98 1145 JAN 11 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ARTHUR J. BREWSTER,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, AUDREY M. CLARKE, as an individual and in her official capacity, ALTHEA L. JENKINS, as an individual and in her official capacity, GARY D. FURUNO, as an individual and in his official capacity, RICHARD ARMSTRONG, as an individual and in his official capacity, LAURA M. BYRD, as an individual and in her official capacity, RACHEL CHAVEZ, as an individual and in her official capacity, CYNTHIA GREEN-GETER, as an individual and in her official capacity, THELMA CALVIN-WILLIAMS, as an individual and in her official capacity, and DOES 1-50, INCLUSIVE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES H. FOSBINDER
Counsel of Record
RHONDA M. FOSBINDER
FOSBINDER & FOSBINDER
Attorneys for Petitioner
415 Dairy Road, Suite E #336
Kahului, HI 96732
(808) 244-1524

150679

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

89 pp

QUESTIONS PRESENTED FOR REVIEW

May school district employees retaliate against a teacher who, in good faith while acting as a union representative, in a calm, non-argumentative and non-repetitive manner, reports to three obviously appropriate school district employees that other teachers have shown him altered attendance records which those teachers allege they have been pressured to sign in order to fraudulently increase the amount of money received by the district from state and federal funds?

Is the law clearly established that an employer may not retaliate against an employee for quietly reporting to his or her supervisor alleged violations of law affecting the employer's federal funding, so that the employer is not entitled to qualified immunity for such conduct?

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioner ARTHUR J. BREWSTER, who was the Plaintiff and Appellee in the courts below. Respondents are THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, AUDREY M. CLARKE, as an individual and in her official capacity, ALTHEA L. JENKINS, as an individual and in her official capacity, GARY D. FURUNO, as an individual and in his official capacity, RICHARD ARMSTRONG, as an individual and in his official capacity, LAURA M. BYRD, as an individual and in her official capacity, RACHEL CHAVEZ, as an individual and in her official capacity, CYNTHIA GREEN-GETER, as an individual and in her official capacity, and THELMA CALVIN-WILLIAMS, as an individual and in her official capacity, who were the Defendants and Appellants in the courts below.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Citations to Opinions Below	1
Jurisdictional Statement	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5

Moran v. Washington, No. 96-36129, slip op. at 5313 (9th Cir. June 2, 1998) 7, 8

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731 (1968) 6, 7, 9

Statutes:

15 U.S.C. § 2622 12

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1443 1

30 U.S.C. § 820(b)(1) 12

30 U.S.C. § 1293 12

31 U.S.C. § 3730(h) 12

33 U.S.C. § 1367 12

42 U.S.C. § 300j-9 12

Cited Authorities

	Page
42 U.S.C. § 5851	12
42 U.S.C. § 6971	12
42 U.S.C. § 7622	12
42 U.S.C. § 9610	12
45 U.S.C. § 441(a)	12
California Labor Code § 1102.5(b)	12
United States Constitution:	
First Amendment	2, 3, 5, 11
Fourteenth Amendment	2

APPENDIX

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed July 13, 1998 ..... 1a

Appendix B — Opinion Of The United States District Court For The Central District Of California Dated And Filed January 9, 1997 ..... 33a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed August 4, 1998 ..... 60a

Appendix D — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Filed October 13, 1998 ..... 62a

Appendix E — Declaration Of Joanne L. Perkins In Support Of Opposition To Motion For Summary Judgment Or Alternatively For Partial Summary Judgment Dated November 3, 1996 And Filed November 19, 1996 ..... 64a

Petitioner respectfully seeks certiorari to review the interlocutory reversal by the Ninth Circuit Court of Appeals of the judgment and opinion by the Central District Court of California denying qualified immunity to the Respondents.

CITATIONS TO OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is found at Docket No. 97-55203 (reporter citation pending), and the Opinion of the Central District of California is found at Docket No. CV-95-5855-DDP (reporter citation pending). These opinions appear in the attached appendix at *Appendix A* and *Appendix B*, respectively.

JURISDICTIONAL STATEMENT

The District Court for the Central District of California had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1443, this action arising under the federal constitution and laws. On January 9, 1997, the District Court for the Central District of California entered its Order rejecting the individual Defendants' qualified immunity defense. Respondents herein appealed the District Court's Order regarding qualified immunity under the collateral order doctrine, over which the Ninth Circuit Court of Appeals has interlocutory jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit Court of Appeals entered its Judgment and Opinion reversing the District Court on July 13, 1998. On July 25, 1998, Petitioner herein submitted a *Petition for Rehearing and Suggestion for Rehearing En Banc*, and on August 4, 1998, the Ninth Circuit requested a response thereto from Respondents herein [*Appendix C*]. The Petition for Rehearing was denied on October 13, 1998 [*Appendix D*]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a civil rights action in which Petitioner, Dr. Arthur J. Brewster (hereinafter "Brewster"), alleges that he was retaliated against by the Lynwood Unified School District Board of Education members and various Lynwood employees (collectively, the "District") after he became an active grievance representative for the Lynwood Teachers Association and after he began to question attendance records which he believed were being falsified.

Brewster has alleged that as a result of his lawful, protected First Amendment activities in acting as a union advocate on behalf of grievants and in raising the attendance records falsification issue, he was retaliated against. That retaliation consisted of his employment contract being altered, his salary being reduced unilaterally and retroactively, his wages garnished, and his employment with the Lynwood Unified School District terminated, all without due process.

Brewster's salary was reduced retroactive to the date of his contract, and the "overpayments" were deducted unilaterally from Brewster's salary at the behest of the Respondents, and Brewster's employment was terminated by virtue of Respondent Furuno's recommendation for Brewster's non-reelection to second-year probationary status. The Board voted to reduce Brewster's salary and to non-reelect him even in the face of his specific allegations of misconduct and retaliation by Furuno, Jenkins and Clarke.

Respondents' position in this matter has been to deny any retaliatory conduct in violation of Brewster's First Amendment rights and/or in violation of his potentially whistleblowing activities with respect to the attendance records, and instead to claim that Brewster's classroom conduct and "inability to control students" was the sole cause of his non-reelection. However, discovery before the court below on motion for summary judgment in this action has shown that this position is fabricated[1], and in fact there is not a single derogatory remark in Brewster's entire personnel file.[2] [CR-41[3]; SER-1, p.19-127]

1. The discovery issues are dealt with by the District Court in its decision at pp.9-10 [CR-63; ER-13, pp.367-368].

2. Respondents' reliance on "evidence" of Brewster's allegedly poor performance was challenged in the court below on the grounds (Cont'd)

Respondent Furuno himself stated in his interrogatory responses nos. 7-8 that,

> I do not dispute that notice to the teacher is required when a teacher received an unsatisfactory evaluation. However, in this case no unsatisfactory evaluation was rendered. . . . My observation of Plaintiff's classroom on December 14, 1994, did not result in a "substandard" classroom/lesson evaluation.

[CR-41,42/SER-1,2, pp.8, 340-343]

The District also claims that the reporting of ADA fraud as attested to by both Brewster and the President of the teacher's union, Joanne Perkins, amounted to merely an insubstantial report of "an error". [*Opening Brief, p. 59*] In fact, the declaration of Joanne Perkins [*Appendix E, attached hereto*], which was overlooked by the Ninth Circuit, supports not only Brewster's allegations that he had in fact raised concerns

---

(Cont'd)
that such "evidence" violates both state law and the Collective Bargaining Agreement, because it was never brought to Brewster's attention prior to this lawsuit and was not included in Brewster's official personnel file but rather was maintained in a separate "secret" file by Principal Furuno revealed only for purposes of this lawsuit. Brewster's complete personnel file was before the District Court as Exhibit 1 to Brewster's declaration, and is filed herewith as part of Petitioner's Supplemental Excerpts of Record. [CR-41/SER-1, pp.19-127].

3. As used throughout Petitioner's Answering Brief, the designation "CR-xx" refers to the specific docket entry found in the Court's Record; the designation "ER-xx, p.xx" refers to the Excerpt of Record submitted by Respondents, and the corresponding page number; and the designation "SER-xx, p.xx" refers to the Supplemental Excerpts of Record submitted by Petitioner, all before the Ninth Circuit.

specifically about possible fraud and falsification of ADA records at a meeting with Respondent Clarke, but also that the allegations were quite serious. [CR-39/SER-4, p.516]

On the District's motion for summary judgment the District Court ruled that the grievances filed by Petitioner as a Lynwood Teachers' Association grievance representative were not speech on matters of public concern and therefore were not protected[4], but that Petitioner's reporting of irregularities in the attendance record keeping *was* protected speech. The District Court thus denied Respondents' motion for summary judgment as to Brewster's First Amendment and due process claims with respect to the reporting of irregularities in the attendance records and with respect to the reduction of Brewster's salary, and also denied Respondents' request for qualified immunity[5].

The District then entered an interlocutory appeal on the issue of whether the individual defendants should have been granted qualified immunity, arguing that the law establishing that Brewster's right to constitutional protection in reporting possible illegal and fraudulent conduct and in asserting due process violations in the reduction of his salary was not clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Ninth Circuit exercised jurisdiction over the District's interlocutory appeal, determining that although there undoubtedly existed contested factual issues in this case, "the fact '[t]hat the parties dispute some of the facts does not render

4. This portion of the District Court's decision, which the Petitioner herein intends to challenge on appeal, is not properly before this Court due to the interlocutory nature of the underlying appeal, which concerns only the application of the doctrine of qualified immunity.

5. Respondents' motion for summary judgment was granted with respect to Brewster's cause of action for failure to train and supervise.

the denial of qualified immunity nonappealable.' [citation omitted]" [*Appendix A*]. In so doing, the Ninth Circuit reversed the denial of qualified immunity by the District Court, holding that the law protecting Brewster was not sufficiently clearly established (under, according to the court, the various conflicting guidelines on how to make such a determination) to subject the individual District employees to liability for their conduct.

REASONS FOR GRANTING THE WRIT

The instant decision by the Ninth Circuit absolutely defeats the right of every employee to quietly advise his or her employer when he or she has an honest, good faith belief that the employer is violating the law, without being terminated or otherwise retaliated against. Indeed, the Ninth Circuit specifically stated:

> Brewster's charges were *far more consequential* that the banal "workplace grievance" found undeserving of constitutional protection in *Havekost v. United States Dept. of Navy*, 925 F.2d 316 (9th Cir. 1991). Rather, the claimed reporting errors — even if only accidental — would have directly impacted the amount of funding available to the school. Consequently, as taxpayers, "the public or community [was] likely to be *truly* interested in [Brewster's] expression" [citation omitted].

Opinion at Appendix A, p. 7343, ¶ 11 [emphasis added].

In granting the District employees qualified immunity, the Ninth Circuit held that although Brewster's speech was a matter of public concern, and was therefore within the ambit of the First Amendment, under the "*Pickering* balancing test" [*Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731

(1968)] his complaints about possible violations of funding laws did not *clearly* constitute protected speech, and therefore because the court itself was unable to successfully engage in such an extremely delicate, somewhat nihilistic balancing test, no reasonable government employee could be expected to, either. As the Ninth Circuit noted:

> In *New Jersey v. T.L.O.*, 469 U.S. 324 (1985), the late Justice Brennan lamented the proliferation of so-called "balancing tests" in constitutional jurisprudence, warning that the freewheeling multifactor inquiries would pave the road to "doctrinally destructive nihilism." *Id.* at 369 (Brennan, J., concurring in part and dissenting in part). Nowhere is Justice Brennan's observation more apropos than in the realm of qualified immunity, in which "clearly established" law reigns supreme. And nowhere is the uncomfortable coexistence of balancing tests and Harlow's "clearly established rights" standard more apparent than in this case, in which a plaintiff laid claim to two separate constitutional rights, each of which depends upon an ad hoc weighing of competing interests.

Opinion, Appendix A, ¶ 23.

Sadly, the "balancing" done by the Ninth Circuit in the instant case oversteps the bounds of justice, setting forth a precedent that conflicts with the whole body of workplace First Amendment law holding that retaliation for protected speech is impermissible, and allows employers immunity for retaliating against employees who non-disruptively allege substantial violations of law. The level of specificity in the so-called "balancing" engaged in by the Ninth Circuit in reaching this and other recent decisions (*see Moran v. Washington*, No. 96-

36129, slip op. at 5313, 5331 (9th Cir. June 2, 1998)) renders it virtually impossible for any employee to overcome the application of qualified immunity.

Because the extremely fact-intensive balancing test engaged in by the Ninth Circuit results in highly inconsistent case outcomes, the law of protected speech under the Ninth Circuit's standards can almost never become clearly established, because the specific facts of one situation will always differ slightly from the specific facts of any other situation. In their decision, the Ninth Circuit pokes mild fun at counsel's comment that "[e]verybody knows about the First Amendment." [*Appendix A, ¶ 10*] While it is true that such an approach is likely far to broad to "clearly establish" an employee's right to speak on matters of public concern without retaliation, it is also true that the approach taken by the Ninth Circuit is far too narrow.

The Ninth Circuit, referencing various Supreme Court and circuit court opinions, acknowledged in its decision:

> . . . [T]he question whether Brewster's speech was protected by the First Amendment is perhaps a close one. After all, both parties can point to important interests supporting their respective sides of the Pickering balance. *Moreover, the relevant cases do not lead us inexorably to a single conclusion; quite the contrary, they point in opposite directions.* (citations omitted). *Thankfully, we need not resolve the merits at this stage.* Rather, we are faced with the "much simpler task," *Moran*, slip. Op. at 5339, of deciding whether the Pickering test so clearly favors Brewster that it would have been unreasonable for the officials to believe that Brewster's non-reelection was lawful. See, *Romero*,

> 981 F.2d at 627. *In view of the competing considerations on each side of the Pickering balance and the absence of specific direction from the relevant case law, it would, we think, be dubious indeed to conclude that Brewster's right to speak was sufficiently "clearly established" to defeat the school officials' assertion of qualified immunity.*

Opinion at Appendix A, ¶ 13-14 [emphasis added].

In evaluating the "competing considerations" set forth in *Pickering, supra*, the Ninth Circuit held:

> [f]or the purposes of this appeal . . . the officials do not contend that the decision to nonreelect him was premised upon his alleged ineptitude as a teacher; rather, they concede that Furuno was motivated to recommend Brewster's nonreelection by Brewster's speech concerning errors in the attendance-reporting process . . . they do not argue that Brewster would have been nonreelected in the absence of his speech

Opinion, p. 7338, ¶ 5. Therefore, as correctly stated by the Court, once the threshold determination was made that the speech involved was a matter of public concern, the issue before it was whether or not Brewster's "interest in expressing himself . . . outweigh[ed] the State's interests in promoting workplace efficiency and avoiding workplace disruption. *Waters v. Churchill,* 511 U.S. 661, 668 (1994)." *Appendix A, p. 7338, ¶ 5.*

Although the Ninth Circuit claims that it recognizes that it was required to resolve all disputed evidence in the light most favorable to Petitioner Brewster, *Appendix A, p. 7335, ¶ 2,* in concluding that "Brewster's allegations of erroneous record keeping were ultimately determined to be false, both by Furuno

and by a team of independent auditors", *Appendix A, p. 7344, ¶ 12*, the Court ignored the contrary refuting evidence expressly recognized by the District Court below:

> However, Brewster has submitted the declaration of JoAnne Perkins, who was the head of the Union when Brewster taught at Will Rogers, who stated that several teachers from her school site approached her stating that they had received their attendance books back only to find that they had been altered by adding the names of students to their classes who were not actually in their classes. (*Appendix E*).

Appendix B. In her declaration, Ms. Perkins elaborates on the fact that the teachers were upset because someone had rewritten their attendance records, and that when they refused to sign them, they were told that the principal would sign it instead. [*Appendix E*].

Taking these allegations as true, then, the general 1994-1995 audit of the attendance records referred to by the Ninth Circuit, which examined only the final attendance documents themselves, ER-p.281, would not have revealed that student names had previously been added to the records examined, and in fact this was to be a point of contention for trial. Furthermore, Brewster stated in his declaration, controverting Furuno's declaration, that even Furuno had stated that he had noticed some "changes" to the ADA reports, although he did not consider them to be "falsifications". ER-p. 368, 480.

Thus, resolving this disputed issue of fact in Brewster's favor, the allegations of falsification should have been considered for purposes of the balancing test to be *true*, not false, and this factor should not have counted against Petitioner on the great free speech scale. Therefore, as a grievance

representative for the teachers who had received certain information, Brewster had a good faith belief that certain laws governing attendance record keeping were being violated, and thereby reported them to the school secretary in charge of accounting as well as to his supervisor.

It is not alleged, nor is there any evidence, that Brewster made a huge ruckus, that he talked and/or wrote to every district administrator, that he spread "rumors" to every teacher, that he went public with his allegations, or that he otherwise behaved in what would generally be considered a manner disruptive to the school. Instead, his entire "disruption of the workplace" consisted of "hurting the feelings" of the attendance secretary by making his report, creating a "personality conflict" between himself and the attendance secretary, and demonstrating a "lack of trust" in his employer because he believed the district was violating the law. *Appendix A, pp. 7343-44, ¶ 12.* Furthermore, the fact that Brewster *didn't* go to the media or otherwise make public his concerns is held *against* him, as if that wouldn't have been "disruptive of the workplace"! *Appendix A, ¶ 12.*

According to this interpretation of the myriad of conflicting cases referred to by the Ninth Circuit, anytime an employee has a legitimate reason to believe that his or her employer is violating the law, he or she can *never* win a lawsuit after being terminated in retaliation for reporting that violation to the employer, because the mere *fact* of the reporting "hurts feelings" and "demonstrates a lack of trust and confidence" in the employer sufficient to "disrupt the workplace". This is a very frightening conclusion, and one that surely not only conflicts with but also defeats the entire body and spirit of workplace First Amendment law.

Thus, the specific has annihilated the general, and although there exist both federal and California laws protecting

"whistleblowers" (ie, persons who point out violations of law) from retaliation (*see, e.g.,* California Labor Code § 1102.5(b); False Claims Act, 31 U.S.C. § 3730(h); Clean Air Act, 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; Energy Reorganization Act, 42 U.S.C. § 5851; Federal Railroad Safety Act, 45 U.S.C. § 441(a); Federal Surface Mining Act, 30 U.S.C. § 1293; Mine Safety Act, 30 U.S.C. § 820(b)(1); Safe Drinking Water Act, 42 U.S.C. § 300j-9; Solid Waste Disposal Act, 42 U.S.C. § 6971; Toxic Substances Control Act, 15 U.S.C. § 2622; Water Pollution Control Act, 33 U.S.C. § 1367), the District officials and others like them are declared immune from liability for retaliating against Brewster for reporting the alleged attendance record violations — this despite "conced[ing] that Furuno was motivated to recommend Brewster's non-reelection by Brewster's speech concerning errors in the attendance reporting process." *Opinion at Appendix A, ¶ 5.* It is a happy governmental agency that knows that it is immune from damages for retaliating against an employee who reports apparent fraud to their supervisors!

One would think that the good faith reporting of possible violations of law would be encouraged, not discouraged, and that it would actually indicate *trust* in the employer that the employee felt safe enough to report the violation to the employer, so it could be remedied, rather than to outsiders or the media, which would surely cause a substantial disruption. Yet this decision, relying on disputed contentions of fact that should have been resolved in Brewster's, rather than the school district's, favor, creates a standard so strict that no employee could ever be protected from retaliatory termination for reporting possible violations of law to his or her employer.

This is a drastically and dangerously narrow interpretation of this Court's directives in the area of free speech in the

workplace, which have been muddied beyond recognition and turned into a conflicting quagmire of decisions of which not even the decision makers themselves can make sense. Without this Court's further direction and intervention, the immunity of employers who retaliate against employees alleging violations of law will become, rather than qualified, absolute.

CONCLUSION

Based on all of the foregoing, Petitioner respectfully submits that a grant of certiorari is appropriate in this important matter.

Respectfully submitted,

JAMES H. FOSBINDER
Counsel of Record
RHONDA M. FOSBINDER
FOSBINDER & FOSBINDER
Attorneys for Petitioner
415 Dairy Road, Suite E #336
Kahului, HI 96732
(808) 244-1524

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JULY 13, 1998

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-55203
D.C. No. CV-95-05855-DDP

ARTHUR J. BREWSTER,

Plaintiff-Appellee,

v.

THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, AUDREY M. CLARKE, as an individual and in her official capacity, ALTHEA L. JENKINS, as an individual and in her official capacity, GARY D. FURUNO, as an individual and in his official capacity, RICHARD ARMSTRONG, as an individual and in his official capacity, LAURA M. BYRD, as an individual and in her official capacity, RACHEL CHAVEZ, as an individual and in her official capacity, CYNTHIA GREEN-GETER, as an individual and in her official capacity, THELMA CALVIN-WILLIAMS, as an individual and in her official capacity, and DOES 1-50, inclusive,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted
April 7, 1998 — Pasadena, California

Appendix A

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether school officials who downgraded and ultimately dismissed a teacher may be held personally liable for allegedly violating First and Fourteenth Amendment rights.

I

Arthur Brewster applied for an elementary school teaching position with the Lynwood, California, Unified School District ("the District") in July 1994. In September, the District hired Brewster as a first-year probationary teacher at the Will Rogers Elementary School ("the school"). Less than four months later, however, Brewster received formal notice that his contract with the school would not be renewed. Brewster's S 1983 claims arise out of two separate and unrelated series of events. The first culminated in the reduction of his salary, and the second resulted in the District's decision not to renew his contract following his first year.

A

On his employment application, Brewster listed his prior experience as follows: nine years as a superintendent, one year as a principal, one year as an associate professor at the graduate school level, and six years as a teacher-principal. California law provides that public school teachers "shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience." Cal. Educ. Code S 45028. School districts are free to define "experience" for purposes of their salary schedules, provided that they administer their

definitions uniformly. See Mayer v. Board of Trustees, 165 Cal. Rptr. 655, 662 (Cal. Ct. App. 1980). The District defines "experience" to include full-time kindergarten-through-twelfth-grade teaching experience, but not administrative or college-level experience. Brewster disputes the District's definition.

Subsequent to his hiring, but prior to his entering into service, Brewster was informed that Althea Jenkins, the Assistant Superintendent for Personnel Services, had reviewed his credentials and placed him at Step 15 of the salary schedule, which equated to a salary of $48,304 plus a $350 stipend for his doctorate degree. Brewster's contract stated that "starting salary is based on verified information at the time of the offer of employment" and that "experience verification will be accepted for sixty (60) days to be retroactive to the starting date." Shortly after he began teaching, Brewster received a memorandum from Jenkins informing him that the District needed the addresses of his former employers so that it could verify the information provided in his application. The parties dispute whether Brewster in fact supplied the requested information.

On December 2, 1994, Jenkins sent to Brewster a memorandum notifying him that only three years of "teaching experience" had been verified by his former employers, and that if additional verification was not received by December 9, the Board of Education would take steps to adjust Brewster's salary. Jenkins sent a second memorandum to Brewster on December 7, alerting him that without the additional verification, his placement on the salary schedule would be corrected to place him at Step 4 instead of Step 15. On December 13, the Board took action to reduce Brewster's salary.

Appendix A

Two days later, Brewster and his union representative, Wiley Jones, met with Jenkins regarding the salary placement issue. Jenkins indicated that she was willing to restore Brewster to his original place in the salary scale if he could demonstrate that other District teachers had previously been given salary-schedule credit for non-teaching, administrative experience. Given the opportunity to present evidence, Brewster informed Jenkins that he believed that another teacher, Rosemary Carrillo, had been given such credit. On January 9, 1995, Jenkins reviewed Brewster's evidence regarding Carrillo and concluded that Carrillo had not, in fact, been awarded salary-schedule credit for administrative experience. Jenkins therefore notified Brewster to confirm that his salary would indeed be reduced.

B

Shortly after beginning teaching at the school, Brewster became involved in the Lynwood Teachers Association as a grievance representative. Brewster informed his principal, Gary Furuno, of his union involvement. Furuno attested that he was pleased that Brewster had decided to become a grievance representative because, prior to becoming principal, he himself had served in a similar capacity in the union. As a grievance representative, Brewster filed several complaints, both on behalf of individual teachers and on behalf of the union in general.

The school officials assert that almost immediately after Brewster began teaching, Furuno recognized that Brewster was experiencing difficulties maintaining classroom discipline. For instance, during the months of September and October of 1994, Brewster referred twenty and nineteen students, respectively, to the principal's office. Furuno also reports that soon after Brewster's arrival at the school, parents and other employees

began to express their concerns about Brewster's lack of classroom management. Furuno states that Brewster was "unable to develop a good working relationship with either his students or some of the other teachers with whom he was required to work." According to Furuno, he suspected in early October, and concluded by November, that he had made a mistake in hiring Brewster and that he would recommend Brewster's "nonreelection" (i.e., contract non-renewal) before the end of the school year.

In late November 1994, in a meeting with Audrey Clarke, the Superintendent of the District, Brewster raised concerns that his daily attendance records were being falsified by the school's attendance clerk in order to increase the school's "Average Daily Attendance" ("ADA"). Brewster reported in his declaration that Clarke "simply stated that changing attendance records was very important because they affect ADA and therefore the amount of federal funding received." Clarke claims that she has no recollection of making such a statement. Shortly after his meeting with Clarke, Brewster confronted Furuno's secretary with what he believed to be an error in the attendance register. He also reported the alleged errors to Furuno, who assured Brewster that he would review the attendance records himself. In examining Brewster's classroom attendance register, however, Furuno found no errors. Furuno's review of the attendance records was confirmed by an independent audit, which revealed no significant errors in the school's attendance accounting procedures.

Furuno conducted a formal observation of Brewster's classroom in mid-December. Although Furuno claimed that the observation "further confirmed the necessity of recommending nonreelection," Brewster reported that Furuno told him that

everything was "fine." Brewster never received a written evaluation.

In a letter dated January 23, 1995, Furuno formally notified Brewster of his decision to recommend Brewster's nonreelection to the Board. Furuno made his formal recommendation to the Board later that month. In February, Brewster was notified by Assistant Superintendent Jenkins that he had the right to address the Board regarding his nonreelection if he so desired. At the Board's February 28 meeting, Brewster argued, for the first time, that his proposed nonreelection was in retaliation for protected union activity. A month later, Brewster received a "Notice of Non-Reemployment/Non-Re-election" providing that his employment with the District would be terminated on June 30.

C

Brewster sued Furuno, Jenkins, Clarke, the Board of Education, and its individual members in federal district court. In his complaint, he alleged seven separate causes of action, two of which were premised upon S 1983 and five of which were premised upon state law. The district court dismissed the state claims. The Board and the individual officials moved for summary judgment on the federal claims. The district court granted the motion with respect to Brewster's failure-to-train claim, but denied the motion — and denied the claims of qualified immunity — with regard to the free speech and procedural due process challenges.

The school officials appealed the district court's rejection of their claims of qualified immunity.

Appendix A

II

The threshold question is whether we have have jurisdiction to entertain this interlocutory appeal. In Mitchell v. Forsyth, 472 U.S. 511 (1985), the Supreme Court held that a district court's denial of a motion for summary judgment predicated on a claim of qualified immunity is, as a general matter, immediately appealable under 28 U.S.C. S 1291 pursuant to the "collateral order doctrine." Id. at 527. As with almost every rule, however, there is an exception:" [A] defendant entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record set forth a 'genuine' issue of fact for trial." Johnson v. Jones, 515 U.S. 304, 319-20 (1995) (emphasis added). Thus, appellate jurisdiction over a summary judgment denial of qualified immunity is limited to reviewing the "purely legal" issue "whether the facts alleged [by the plaintiff] support a claim of violation of clearly established law." Mitchell, 472 U.S. at 528 n.9; accord Armendariz v. Penman, 75 F.3d 1311, 1317 (9th Cir. 1996) (en banc).

It cannot be doubted that there are contested factual issues in this case. Indeed, our own recitation of the facts demonstrates as much. However, the fact "[t]hat the parties dispute some of the facts does not render the denial of qualified immunity non-appealable." P.B. v. Koch, 96 F.3d 1298, 1301 (9th Cir. 1996). As the Supreme Court recently explained:

> Denial of summary judgment often includes a determination that there are controverted issues of material fact, and Johnson surely does not mean that every such denial of summary judgment is nonappealable. Johnson held, simply, that

> determinations of evidentiary sufficiency at summary judgment are not immediately appealable.

Behrens v. Pelletier, 116 S. Ct. 834, 842 (1996) (citations omitted). The officials in this case are not contesting issues of "evidentiary sufficiency" (as were the defendants in Johnson);[1] rather, they merely contend that "even on Plaintiff's version of the relevant disputed facts, no clearly established law indicated that 'what [they were] doing' violated th[e] law." Consequently, we conclude that we do possess jurisdiction over the narrow but important question whether the rights that Brewster claims were clearly established at the time of the alleged deprivations. In resolving the appeal, we simply assume the disputed facts in the light most favorable to Brewster, and then decide, under those facts, whether the school officials violated any of Brewster's clearly established constitutional rights. See Johnson, 515 U.S. at 319; Chateaubriand v. Gaspard, 97 F.3d 1218, 1222 (9th Cir. 1996).

III

The rule of qualified immunity is a familiar one: Public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The plaintiff shoulders the burden of proving that the rights he claims are "clearly established." See Davis v. Scherer, 468 U.S. 183, 197 (1984). The Supreme Court has made clear that

---

1. The school officials do raise two "evidentiary sufficiency" arguments as fallback positions. However, in light of our disposition of the "clearly established" issue, we find it unnecessary to reach those contentions. See infra notes 5 and 10.

qualified immunity provides a protection to government officers that is quite far-reaching. Indeed, it safeguards "all but the plainly incompetent or those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree on th[e] issue [whether a chosen course of action is constitutional], immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986); see also Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997) ("Th[e] test allows ample room for reasonable error on the part of the [government official].").

The Supreme Court has also amplified what it means for a right to be "clearly established" within the meaning of Harlow. Specifically, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). In other words, before being charged with monetary liability, public officials must be given clear notice that their conduct is unlawful. To that end, the Supreme Court has observed that the Harlow standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." Id. at 639. In assessing claims of qualified immunity, reviewing courts must not view constitutional rights in the abstract but rather "in a more particularized, and hence more relevant, sense." Id. at 640. Thus, in order to ensure that government officials receive necessary guidance, courts should focus the qualified immunity inquiry at the level of implementation. As this court has put the matter, "the right referenced by the Harlow test is not a general constitutional guarantee . . . but its application in a particular context." Todd v. United States, 849 F.2d 365, 370 (9th Cir. 1988); accord Kelley v. Borg, 60 F.3d 664, 667 (9th Cir. 1995) ("[B]road rights must be particularized before they are subjected to the clearly established test."). In other words, courts adjudicating

claims of qualified immunity must look not to constitutional guarantees themselves but to the various doctrinal tests and standards that have been developed to implement and to administer those guarantees. See generally Richard H. Fallon, The Supreme Court, 1996 Term — Foreword: Implementing the Constitution, 111 Harv. L. Rev. 56, 56 (1997) ("Even when general agreement exists that the Constitution reflects a particular value or protective purpose, questions of implementation often remain.").

A

Brewster first claims that his nonreelection was in retaliation for his work as a union grievance representative and his allegations regarding what he believed to be errors in the schools' attendance-accounting practices. He argues that the District's decision not to rehire him on these bases violated his First Amendment right to free speech. The officials respond that Brewster's filing of union grievances and reporting of alleged attendance-accounting errors do not constitute speech protected by the First Amendment.

Public employees do not by virtue of their employment altogether relinquish the First Amendment rights that they would otherwise enjoy as United States citizens. See United States v. National Treasury Employees Union, 513 U.S. 454, 465 (1995). Nor, however, do public employees enjoy anything that approaches an "absolute" freedom of speech. See Umbehr v. Board of County Comm'rs, 116 S. Ct. 2342, 2347 (1996). In fact, the Supreme Court has expressly recognized that "the government as employer . . . has far broader powers [to restrict expression] than does the government as sovereign." Waters v. Churchill, 511 U.S. 661, 671 (1994). When a public employee

alleges that he has been discharged (or, in this case, nonreelected) in retaliation for exercising his First Amendment rights, courts must engage in a three-part inquiry:

> To prevail, an employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the [nonreelection]. If the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct.

Umbehr, 116 S. Ct. at 2347 (enumeration added). As a probationary teacher who entered into service in September 1994, Brewster was subject to nonreelection for any legal reason prior to March 15, 1996. See Cal. Educ. Code S 44929.21. For the purposes of this appeal, however, the officials do not contend that the decision to nonreelect him was premised upon his alleged ineptitudes as a teacher; rather, they concede that Furuno was motivated to recommend Brewster's nonreelection by Brewster's speech concerning errors in the attendance-reporting process. Moreover, they do not argue that Brewster would have been nonreelected in the absence of his speech. As a result, in evaluating the individual officials' entitlement to qualified immunity, the only issue before us is whether it was "clearly established" in early 1995 that Brewster's speech was deserving of constitutional protection. If it was, we must affirm; if not, we must reverse.

Obviously, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a

constitutional right at all." Siegert v. Gilley, 500 U.S. 226, 232 (1991). In order for a public employee's speech to be "protected" under the First Amendment within the meaning of step one of the three-step test, (1) the speech must involve a matter of public concern and (2) the employee's interest in expressing himself must outweigh the State's interests in promoting workplace efficiency and avoiding workplace disruption. See Waters, 511 U.S. at 668.

1

"In evaluating the First Amendment rights of a public employee, the threshold inquiry is whether the statements at issue substantially address a matter of public concern." Roe v. City & County of San Francisco, 109 F.3d 578, 584 (9th Cir. 1997). If they do not, then the First Amendment is not triggered at all, and "it is unnecessary . . . to scrutinize the reasons" for the employer's action. Connick v. Myers, 461 U.S. 138, 146 (1983). The district court in this case concluded that Brewster's allegations regarding attendance-accounting errors were of public concern because the attendance figures "determine[d] the amount of federal funding that the school received."[2] In order to determine whether an employee's speech involves a matter of public concern, a reviewing court must scrutinize "the content, form and context of [the] statement." Connick, 461 U.S. at 147-48. If employee expression relates to an issue of "political, social, or other concern to the community," it may fairly be said to be of public concern. Id. at 146.

---

2. The district court determined that Brewster's union activity "did not concern issues that would matter to the public." For obvious reasons, the school officials have not appealed that ruling.

Appendix A

As an initial matter, the parties dispute whether Brewster's allegations regarding the school's attendance register were merely claims that the records contained "errors" or instead constituted charges of something more sinister, namely, that school officials were deliberately and fraudulently falsifying records in order to increase funding. The factual record suggests that during a meeting with Superintendent Clarke in late November 1994, Brewster did, in fact, raise his concerns that attendance records were being "falsified" by the attendance clerk in order to increase "Average Daily Attendance" figures. However, in a subsequent meeting with Principal Furuno, Brewster claimed only that he believed that there were "errors" in the attendance records. It is significant, in this respect, that the district court found in its order that "although the Board of Education had to approve of Brewster's nonreelection, the decision to nonreelect Brewster effectively was Furuno's alone." Moreover, nothing in the record suggests either that Clarke's involvement, if any, in the decision not to re-elect Brewster had anything to do with the attendance-reporting allegations,[3] or that Clarke ever communicated the substance of his conversation with Brewster to Furuno. Consequently, it appears from the record that the speech that purportedly got Brewster into trouble was his allegation of accounting "errors" to Furuno, not his charge of accounting "fraud" to Clarke.

---

3. Brewster's only assertion of Clarke's personal involvement in the decision to nonreelect related to Clarke's purported knowledge of Brewster's union activities. The district court, however, concluded that Brewster's actions as a grievance representative did not implicate matters of public concern, and were thus outside the scope of the First Amendment altogether. See (supra) note 2. Consequently, we need not concern ourselves with Clarke's involvement, or the statements made to Clarke regarding "falsification" of accounting records.

For the purposes of this appeal, however, we shall simply assume, without deciding, that Brewster's allegations — whether of errors or of fraud — constitute speech on a matter of public concern, and are therefore within the ambit of the First Amendment.

2

Of course, the fact that an employee's expression touches on an issue of public concern does not automatically entitle him to recover. The "public concern" prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the "coverage" of the First Amendment, and thus "ensures that a court will test the reasons for restriction against first amendment standards." Frederick Schauer, Public Figures, 25 Wm. & Mary L. Rev. 905, 932 n.113 (1984). In determining whether speech involving a matter of public concern merits constitutional protection, courts engage in a balancing test, first announced in Pickering v. Board of Education, 391 U.S. 563 (1968):

> The question whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 284 (1977) (quoting Pickering, 391 U.S. at 568). In conducting this balancing, courts must give government employers "wide

discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." Connick, 461 U.S. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)). Moreover, public employers need not allege that an employee's expression actually disrupted the workplace; "reasonable predictions of disruption" are sufficient. Waters, 511 U.S. at 673.

This court has observed that the Pickering test "requires particularized balancing on the unique facts presented in each case," Voigt v. Savell, 70 F.3d 1552, 1560-61 (9th Cir. 1995), and the Supreme Court has specifically stated that the Pickering balance is a "difficult" one to strike, see Connick, 461 U.S. at 150. Because, under Pickering, the determination whether an employee's expression is constitutionally protected requires a fact-sensitive, context-specific balancing of competing interests, the law regarding public-employee free speech claims will "rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity under Harlow and its progeny." Moran v. Washington, No. 96-36129, slip op. at 5313, 5331 (9th Cir. June 2, 1998); accord Kincade v. City of Blue Springs, 64 F.3d 389, 398 (8th Cir. 1995); DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995); O'Connor v. Steeves, 994 F.2d 905, 917 n.11 (1st Cir. 1993); Guercio v. Brody, 911 F.2d 1179, 1183-85 (6th Cir. 1990); Melton v. City of Oklahoma City, 879 F.2d 706, 729 (10th Cir. 1989), modified on other grounds, 928 F.2d 920 (1991) (en banc); Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989); Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988); Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986); cf. Baker v. Racansky, 887 F.2d 183, 187 (9th Cir. 1989) ("[I]f

the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." (quoting Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987)) (internal quotation marks omitted)).

Despite the fact that employee-free-speech rights will not, as a general matter, be clearly established under Harlow and Anderson, we must determine whether the specific facts of this case present one of those rare instances in which Pickering rights are, despite balancing, clearly established. At oral argument, in the course of arguing that the District had violated his clearly established rights, Brewster's counsel declared that "[e]verybody knows about the First Amendment." That may very well be so; however, Brewster's chosen characterization of the pertinent legal rule — "the First Amendment" — is precisely the broad-based characterization that the Supreme Court has forbidden in the qualified immunity context. See Anderson, 483 U.S. at 640 (directing reviewing courts to view claimed constitutional and statutory rights in a "particularized" sense). The legal right at issue is not the generic right to free speech. Nor is it the right to be free from expression-based retaliatory discipline or discharge. Rather, whether or not Brewster enjoyed a clearly established right to speak "depends upon the sensitive ad hoc balancing that Pickering entails." Moran, slip op. at 5328. The issue the court must decide, therefore, is whether the outcome of the Pickering balance so clearly favored Brewster that it would have been patently unreasonable for the school officials to conclude that the First Amendment did not protect his speech. See Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991).

In striking the balance, we emphasize that Brewster's interest in speaking out on a matter of public concern cannot be gainsaid. We have assumed that the alleged errors in the school's attendance accounting were not "matters of only personal interest." Connick, 461 U.S. at 147. And we acknowledge that Brewster's charges were far more consequential than the banal "workplace grievance" found undeserving of constitutional protection in Havekost v. United States Department of Navy, 925 F.2d 316 (9th Cir. 1991). Rather, the claimed reporting errors — even if only accidental — would have directly impacted the amount of funding available to the school. Consequently, as taxpayers, "the public or community [was] likely to be truly interested in [Brewster's] expression." Roe, 109 F.3d at 585.

A number of balancing considerations weigh in favor of the school officials, however. First, courts have found it significant when employee expression disrupts harmony among co-workers. See Rankin v. McPherson, 483 U.S. 378, 388 (1987); Hyland v. Wonder, 972 F.2d 1129, 1139 (9th Cir. 1992). Here, although the district court deemed the disruption of co-worker relations "minor," it cannot be doubted that Brewster's allegations engendered some intra-school disharmony. Indeed, Ida Carbajal, the school secretary in charge of attendance accounting, stated that Brewster's charges were "hurtful" and "proved to [her] that [she] could not trust" Brewster. Of course, Carbajal's "hurt feelings" cannot be determinative of the balance; nevertheless, the existence of a "personality conflict[ ]" between school employees is a relevant consideration. See Nicholson v. Board of Education, 682 F.2d 858, 865-66 (9th Cir. 1982); see also Connick, 461 U.S. at 151 (considering office morale and potential disharmony as relevant to Pickering calculus). Second, Brewster specifically conceded

that "the relationship between teacher and principal is a close working relationship with frequent contact and requires trust and respect in order to be successful." This is precisely the type of employment relationship with respect to which the Supreme Court has concluded that "a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. at 151-52. Third, courts have also considered as relevant to the Pickering determination that an employee's speech interferes with the fulfillment of his own office duties. See Rankin, 483 U.S. at 388; Hyland, 972 F.2d at 1139. In Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997), we specifically recognized that an employee's "lack of trust and confidence" in his employer — such as that demonstrated by Brewster toward the District with regard to its attendance reporting — held the danger of compromising his on-the-job performance. See id. at 1225. Fourth, it is significant in weighing the relevant interests that Brewster's speech "was not directed to the public or the media, but rather to a governmental colleague." Roe, 109 F.3d at 585. Although the private nature of the statement does not remove it from the realm of "public concern" altogether, see Rankin, 483 U.S. at 387 n.11, we have acknowledged that a "narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech." Roe, 109 F.3d at 585.[4] Finally, weighing against Brewster's claim is

4. The Roe court was speaking in the context of evaluating whether the speech there at issue touched on a matter of "public concern" rather than in the context of balancing private and governmental interests. However, the Pickering test is a "true" balancing test — that is, "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." Connick, 461 U.S. at 150. Consequently, the degree to which the speech involves a matter of public concern — the "publicness" of the speech, so to speak — is directly relevant to the Pickering balance.

the fact that, despite their public concern character, Brewster's allegations of erroneous recordkeeping were ultimately determined to be false, both by Furuno and by a team of independent auditors. See Johnson v. Multnomah County, 48 F.3d 420, 424 (9th Cir. 1995) ("[T]he falseness of the statements [at issue] should be considered . . . as part of the Pickering balance.").

On the merits, the question whether Brewster's speech was protected by the First Amendment is perhaps a close one. After all, both parties can point to important interests supporting their respective sides of the Pickering balance. Moreover, the relevant cases do not lead us inexorably to a single conclusion; quite the contrary, they point in opposite directions. Compare, e.g., Waters, 511 U.S. 661 (favoring the employer), Connick, 461 U.S. 138 (same), Rendish, 123 F.3d 1216 (same), Weisbuch v. County of Los Angeles, 119 F.3d 778 (9th Cir. 1997) (same), Nelson v. Pima Community College, 83 F.3d 1075 (9th Cir. 1996) (same), Voigt, 70 F.3d at 1532 (same), Wheaton v. Webb-Petett, 931 F.2d 613 (9th Cir. 1991) (same), and Nicholson, 682 F.2d 858 (same) with, e.g., Rankin, 483 U.S. 378 (favoring the employee), Pickering, 391 U.S. 563 (same), and McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) (same).

Thankfully, we need not definitively resolve the merits at this stage. Rather, we are faced with the "much simpler task," Moran, slip op. at 5339, of deciding whether the Pickering test so clearly favors Brewster that it would have been unreasonable for the officials to believe that Brewster's nonreelection was lawful. See Romero, 981 F.2d at 627. In view of the competing considerations on each side of the Pickering balance and the absence of specific direction from the relevant case law, it would, we think, be dubious indeed to conclude that Brewster's

right to speak was sufficiently "clearly established" to defeat the school officials' assertion of qualified immunity. We therefore reverse the district court's denial of qualified immunity with respect to Brewster's free speech claims.[5]

B

Brewster also maintains that the school officials violated his procedural due process rights when they unilaterally reduced his salary and then retroactively withheld money from his paychecks in order to recoup what they believed to be prior overpayments. The officials counter by arguing, first, that Brewster had no protectible "property interest" in his initial placement on the salary schedule because the placement was incorrect and, second, that even if Brewster did possess a property interest in his initial salary, he was afforded all the process that he was constitutionally due.[6]

A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections. In seeking to defeat a claim of qualified immunity, the plaintiff

---

5. Because we conclude that no official violated any of Brewster's clearly established First Amendment rights, we need not consider the argument that there is insufficient evidence to support a S 1983 claim against Jenkins, Clarke, or the individual members of the Board of Education.

6. The officials also maintain that the District did not, in fact, retroactively reduce Brewster's salary. However, the district court concluded, as a factual matter, that the District did recoup overpayments. Consequently, for the purposes of this appeal, we too must assume that a retroactive reduction in salary did occur.

bears the burden of proving not only that both elements of his claim are resolved in his favor, but also that both elements are "clearly established" in his favor. See Davis, 468 U.S. at 197.

I

To state a claim under the Due Process Clause, a plaintiff must first establish that he possessed a "property interest" that is deserving of constitutional protection. See Gilbert v. Homar, 117 S. Ct. 1807, 1811 (1997). In its order, the district court rejected the officials' factual contention that Brewster was incorrectly placed at Step 15 initially and could not, therefore, possess a protected property interest in his initial salary. Rather, assuming the disputed facts in the light most favorable to Brewster, the court found, for the purposes of summary judgment, "that the District properly placed Brewster on the salary schedule when [he] started working at Will Rogers in September." It went on to conclude, without elaboration, that "[i]f the placement was proper, Brewster had a protectible property interest in the salary."

In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court explained the source and nature of constitutionally cognizable property interests:

> Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. In order to possess a property interest in a benefit, an individual must have more than "an abstract need or desire for it" or "a unilateral expectation of it." Rather, he must possess "a legitimate claim of entitlement to it." Id.

In seeking to demonstrate a protected property interest, there are two potential sources of entitlement to which Brewster might point. First, it is not inconceivable that Brewster's employment contract — which stated that "Your starting salary will be Group V-M, Step 15, plus benefits" — created a property interest in his original salary. A second possible source might be S 45028 of the California Education Code, which provides that public school teachers "shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience." Cal. Educ. Code S 45028. For the purposes of this appeal, we shall simply assume, without deciding, that — by virtue of either his contract or S 45028 — Brewster enjoyed a protected property interest in his original salary placement, and that the safeguards of the Due Process Clause are therefore in play.

2

"In order to state a claim under the fourteenth amendment, the complainant must allege facts showing not only that the State has deprived him of a . . . property interest but also that the State has done so without due process of law." Gearhardt v. Thorne, 768 F.2d 1072, 1073 (9th Cir. 1985) (quoting Marrero v. City of Hialeah, 625 F.2d 499, 519 (5th Cir. 1980)) (internal quotation marks omitted). Consequently, once a court determines that a protected property interest has been taken, "the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Appendix A

The question of "what process is due" is more easily asked than answered. As the Supreme Court has frankly acknowledged, "[f]or all its consequence, 'due process' has never been, and perhaps never can be, precisely defined." Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981). Rather, the phrase "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." Id. As a result, deciphering and applying the Due Process Clause is, at best, "an uncertain enterprise." Id.

Precisely what procedures the Due Process Clause requires in any given case is a function of context. After all, "unlike some legal rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (quoting Joint Anti-Fascist Comm'n v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)) (quotation marks omitted). Rather, it "is flexible and calls for such procedural protections as the particular situation demands." Morrissey, 408 U.S. at 481. As this court has observed, "[t]he determination of what procedures satisfy due process [in a given situation] depends upon an analysis of the particular case in accordance with the three-part balancing test outlined in Matthews v. Eldridge, 424 U.S. 319 (1976)." Orloff v. Cleland, 708 F.2d 372, 378-79 (9th Cir. 1983) (parallel citations omitted). In Matthews, the Supreme Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through

> the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Matthews, 424 U.S. at 335.

"While the right to due process is 'clearly established' by the Due Process Clause, this level of generality was not intended to satisfy the qualified immunity standard." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 70 F.3d 1095, 1100 (9th Cir. 1995). Rather, courts must look to the Matthews test. And, as is the case with respect to public-employee free speech claims, see (supra) Part III.A.2., because procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims "can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." Baker v. Racansky, 887 F.2d 183, 187 (9th Cir. 1989) (quoting Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987)) (internal quotation marks omitted). Indeed, without specific direction from cases applying it, the Matthews standard is perhaps even less amenable to the discovery of clearly established law than are the Pickering test and other multifactor balancing tests that arise in constitutional jurisprudence. Not only does the Matthews inquiry require a delicate balancing of several competing interests, it requires that balancing at several separate stages of the procedural due process calculus. First, courts employ the Matthews balance to determine whether an individual is entitled to a predeprivation (as opposed to post-deprivation) hearing. See, e.g., Zinermon v. Burch, 494 U.S. 113, 127-29 (1990). Second, courts look to

Matthews in determining the specific procedures that the hearing (whether pre- or postdeprivation) should entail. See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16-19 (1978). Finally, if a court determines that a formal adversarial hearing is required, it will consult the Matthews standard in establishing the appropriate standard of proof that the government must meet. See, e.g., Addington v. Texas, 441 U.S. 418, 425 (1979). The result of combining the Matthews test's ambiguity with its ubiquity is unsurprising: "[O]ne cannot accurately predict how any specific case will be decided." Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure S 17.8, at 663 (2d ed. 1992).

As with Brewster's First Amendment claims, notwithstanding the fact that procedural due process rights oftentimes will not be "clearly established" within the meaning of Harlow and Anderson, we must consider the specific facts of this case to determine whether it presents one of those occasions in which the rights are clearly established. The question presented therefore boils down to this: Has Brewster proven that, under the three-part balancing analysis of Matthews and the precedents that have applied it, he had a "clearly established" right to process more comprehensive than that provided by the District?

The base requirement of the Due Process Clause is that a person deprived of property be given an opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The precise timing of a hearing — whether it must be before or instead may be after the alleged property deprivation has occurred — is, of course, a function of the nebulous Matthews balance.

And although the Supreme Court has held that an individual should normally be given notice and an opportunity to be heard before he is deprived of his property, see United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993), that rule is assuredly not hard and fast. See Parratt v. Taylor, 451 U.S. 527, 540 (1981) ("[W]e have rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property."), overruled in part on other grounds by Daniels v. Williams, 474 U.S. 327 (1986). Rather, when countervailing interests require it, the State may dispense with predeprivation process. For instance, "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." FDIC v. Mallen, 486 U.S. 230, 240 (1988).

In recent years, the Supreme Court has extended the reach of this so-called "exception" considerably, and has held on a number of occasions that post-deprivation process alone satisfies the Due Process Clause. For instance, in Mallen, 486 U.S. 230, the Court held that the FDIC's interest in immediately suspending indicted bank officers outweighed the officers' interest in retaining their positions and therefore justified dispensing with predeprivation process. See id. at 241. Similarly, in Barry v. Barchi, 443 U.S. 55 (1979), the Court concluded that a State's interest in protecting the integrity of the sport of horseracing trumped horse trainers' interest in avoiding suspension and thus warranted a postponement of hearings. See id. at 64-65. In the instant case, the District's interest in halting what it believed to be substantial overpayments to Brewster — payments that indirectly affected citizens' tax liability and that might have been difficult to

recover after the fact — is at least as compelling as the interest in preserving the integrity of the sport of horseracing. See Mallen, 486 U.S. at 241 (using State's interest in protecting integrity of horseracing as baseline for measuring other state interests). On the other side of the balance, Brewster's interest in maintaining a particular salary grade is less weighty than — and hence entitled to less deference than — the significant private interest at issue in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the interest in avoiding permanent dismissal from a tenured position. Cf. Gilbert, 117 S. Ct. at 1813 ("Unlike the employee in Loudermill, who faced termination, respondent faced only a temporary suspension without pay."). Accordingly, it would not have been unreasonable, see Romero, 931 F.2d at 627, for District officials to conclude, in view of the most relevant cases, that in Brewster's situation, the Matthews balance did not clearly weigh in Brewster's favor and, consequently, that predeprivation process was not constitutionally required.

Even if a predeprivation hearing were clearly required on these facts, the officials would nonetheless be entitled to qualified immunity because it is not clear, under Matthews, that the predeprivation process that Brewster received fell below the constitutional minimum. The Supreme Court has made clear that in circumstances in which a predeprivation hearing is required by due process, it "need not be elaborate." Loudermill, 470 U.S. at 545. The hearing need not even approximate a trial-like proceeding; in fact, it may be "very limited" and still pass constitutional muster. Gilbert, 117 S. Ct. at 1811. A predeprivation hearing serves only as "an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges are true and support the proposed action." Loudermill, 470 U.S. at

545-46. To that end, a plaintiff need only be accorded "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546.

On the facts of this case, Brewster received predeprivation process that was more than constitutionally adequate. Prior to any action being taken with regard to his salary, Brewster was notified in writing on two separate occasions. First, on December 2, 1994, Brewster received a memorandum from Jenkins explaining that the District had received verification of only three years of teaching experience and that unless additional verification was received by December 9, Brewster's salary would be reduced. The memorandum also alerted Brewster to the fact that the reduction recommendation would be submitted to the Board of Education at its meeting on December 13. Brewster received a virtually identical memorandum from Jenkins on December 7. Significantly, both memoranda specifically solicited Brewster's input: "If you have any questions regarding this matter, please contact the certificated personnel office." When additional verification was not received, the Board took preliminary steps to reduce Brewster's salary on December 13.

Subsequent to the Board's action, on December 15, Brewster met with Jenkins to discuss the salary reduction. He was accompanied by his union representative, Wiley Jones. During the meeting, Jenkins indicated that she was willing to change her initial position and to prevent the reduction of Brewster's salary if Brewster could demonstrate that the District had previously awarded salary-schedule credit for non-teaching experience. Brewster does not dispute that he "was given an additional opportunity to present evidence supporting his claim for additional experience credit" and that, to that end, he

informed Jenkins that he believed a woman named Rosemary Carrillo had received administrative-experience credit. On January 9, 1995, after reviewing Carrillo's personnel records, Jenkins advised Brewster that Carrillo had not received such credit, and confirmed the reduction of Brewster's salary.

Obviously, Brewster did not suffer a final deprivation of his property until January 9, 1995. Until that date, his place on the salary scale remained uncertain. Regardless of the Board's decision, had Jenkins concluded that Brewster's allegations regarding Carrillo were correct, Brewster would have retained his Step-15 pay. Both the Supreme Court and this court have held that a predeprivation hearing, where required, need only take place before an individual is "finally" deprived of a property interest. See Parratt, 451 U.S. at 539-40; Matthews, 424 U.S. at 332; Gearhardt, 768 F.2d at 1073. Consequently, because Jenkins ultimately held the key to Brewster's salary-scale placement, January 9, the date of Jenkins's final decision — and not December 13, the date of the Board meeting — is the relevant date for evaluating the constitutional sufficiency of Brewster's predeprivation process. Viewed in that light, it seems to us beyond dispute that the process provided by the District more than satisfied constitutional requirements. Not only was Brewster informed of the nature of the "charges" against him and given ample opportunity to respond, see Loudermill, 470 U.S. at 546, he was permitted a counseled, face-to-face confrontation with Jenkins and was invited to present evidence on his own behalf. Under no reasonable interpretation of the relevant precedents could it be claimed that the process provided violated any of Brewster's clearly established due process rights.

Moreover, even were we to assume that Brewster was actually deprived of his rightful salary by the Board's action on

December 13, instead of on January 9, the process that he was afforded nonetheless satisfied the rather meager requirements that the Supreme Court has established for predeprivation hearings. See Gilbert, 117 S. Ct. at 1811. In Loudermill, a case involving the discharge of several tenured state employees, the Court held that a constitutionally adequate predeprivation hearing consisted of only three elements: (1) oral or written notice to the employee of the "charges" against him; (2) an explanation of the employer's evidence; and (3) an opportunity to respond, either in person or in writing. See Loudermill, 470 U.S. at 546. In judging the sufficiency of the process accorded Brewster, we must, of course, recognize that, unlike Loudermill, Brewster had not been threatened with immediate termination, only a reduction in salary. Consequently, the first prong of the Matthews test — the private interest affected — is slightly less weighty in Brewster's case than in Loudermill's. As a result, Brewster was entitled to marginally less process than was Loudermill. See Matthews, 424 U.S. at 335.

Together, the two memoranda — dated December 2, 1994, and December 7, 1994 — fulfilled the requirements of due process. Both memoranda notified Brewster that the District had not received necessary experience verification. Both informed Brewster that if the verification was not received by December 9, his salary would be reduced. Finally, and most significantly, both expressly offered Brewster the opportunity to respond to the allegations. Pursuant to Loudermill and Matthews, that is all that is required at the predeprivation stage. Immediately after the Board's decision, Brewster was given a personal audience with Jenkins.[7] Although there is no specific formula

7. Brewster does not challenge the promptness of the hearing with Jenkins. Nor could he. See Mallen, 486 U.S. at 242 (approving delay of 90 days prior to post-deprivation hearing).

for what procedures a post-deprivation hearing must entail, it is significant that, at the meeting, Brewster was accompanied by a counsel-like figure, his union representative, and was also permitted to present evidence and to confront Jenkins, his "accuser." See Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 779-80 (9th Cir. 1982).[8]

Consequently, whether one assumes that the "deprivation" occurred on December 13, 1994, or on January 9, 1995, the procedures provided by the District satisfied the dictates of due process. At the very least, they were not so clearly insufficient as to deprive the District officials of qualified immunity.[9] It would not, in the words of the Supreme Court, have been "unreasonable in this case, under Fourteenth Amendment due process principles, for the [officials] to conclude that [Brewster] had been provided with the fundamentals of due process." Davis, 468 U.S. at 192. We therefore reverse the district court's

---

8. Brewster does not allege that Jenkins was not an impartial decision-maker. See Clements v. Airport Authority, 69 F.3d 321, 332 (9th Cir. 1995).

9. The only relevant case cited by Brewster for the proposition that the process he received was constitutionally insufficient is Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990). There is, however, a crucial distinction between this case and Sanchez. In Sanchez, the plaintiff "received no hearing or an opportunity to be heard at any time." Id. at 430 (emphasis added). Presumably, when an individual is given neither a predeprivation hearing nor a post-deprivation hearing at which to contest the taking of his property, his clearly established due process rights have been violated, because under no reading of Matthews could such a taking be constitutional. In that case, the offending officials would not be entitled to qualified immunity. That case, however, is not this case.

denial of qualified immunity with respect to Brewster's procedural due process claims.[10]

IV

In New Jersey v. T.L.O., 469 U.S. 325 (1985), the late Justice Brennan lamented the proliferation of so-called "balancing tests" in constitutional jurisprudence, warning that the freewheeling multifactor inquiries would pave the road to "doctrinally destructive nihilism." Id. at 369 (Brennan, J., concurring in part and dissenting in part). Nowhere is Justice Brennan's observation more apropos than in the realm of qualified immunity, in which "clearly established" law reigns supreme. And nowhere is the uncomfortable coexistence of balancing tests and Harlow's "clearly established rights" standard more apparent than in this case, in which a plaintiff laid claim to two separate constitutional rights, each of which depends upon an ad hoc weighing of competing interests.

Because we conclude that neither Brewster's First Amendment rights under Pickering nor his procedural due process rights under Matthews were "clearly established," as required by Harlow, the school officials are entitled to immunity from monetary damages.

REVERSED.

---

10. As is the case with regard to the First Amendment claims, see supra note 5, because we conclude that no official violated any of Brewster's clearly established procedural due process rights, we need not consider the argument that there is insufficient evidence to sustain a claim against Furuno, Clarke, or the individual members of the Board of Education.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED JANUARY 9, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 95-5855 DDP (AJWx)

ARTHUR J. BREWSTER,

Plaintiff,

v.

THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, *et al.*

Defendants.

Order Denying In Part And Granting In Part
Defendants' Motion For Summary Judgment

Defendants' motion for summary judgment came before the Court on December 2, 1996. After reviewing and considering the materials submitted by the parties and hearing oral argument, the Court denies the motion in part and grants the motion in part.

Appendix B

II. Background

A. *Nature of the Case.*

Defendant Lynwood Unified School District ("District") hired plaintiff Arthur J. Brewster as a first-year probationary teacher at the Will Rogers Elementary School on September 6, 1994.

As a first-year probationary teacher, Brewster was subject to nonreelection for any reason other than an illegal reason prior to March 15 of his second probationary year. California Education Code § 44929.21. Gary Furuno, the Principal at Will Rogers and Brewster's immediate supervisor, recommended Brewster's nonreelection in January of 1995. The District's Governing Board accepted this recommendation and Brewster was notified of his nonreelection on March 24, 1995, which was prior to March 15 of his second year.

Furuno asserts that his recommendation was based on Brewster's inadequate classroom performance. Brewster brought this litigation asserting that he was nonreelected in retaliation for exercising his First Amendment rights.

Brewster brought thin action against the Board of Education, Audrey Clarke (the District's Superintendent.), Althea Jenkins (the District's Assistant Superintendent for Personnel Services), and Furuno. Brewster's complaint alleged seven causes of action: two claims under 42 U.S.C. § 1983 and five state law claims. The § 1983 claims were dismissed with prejudice as to the Board of Education and its members and employees in their official capacities. Brewster's state law claims were dismissed with leave to amend, but Brewster never

amended his complaint, and the state claims therefore have been dismissed. The only remaining claims, are the § 1983 claims against the individual defendants.

Brewster's § 1983 claims are based on three theories: (1) he was nonreelected in retaliation for exercising his First Amendment free speech rights; (2) his due process rights were violated when his placement on the District's salary schedule was changed; and (3) his civil rights were violated by the Board when the Board failed to adequately train and supervise its employees.

B. *Facts*

Brewster applied for an elementary school teaching position with the District on July 5, 1994. Defendants' motion asserts that Brewster listed 17 years of *teaching* experience on his employment application. However, on his application, Brewster listed his experience as follows; nine years as a superintendent of schools, one year as a principal., one year as a college professor, and six years as a combined teacher-principal (Jenkins Decl., Ex. 1.) The application informed him that if any of the statements made in the application were untrue, he would be subject to disqualification or dismissal from employment with the District (Jenkins Decl. at 2; Jenkins Decl., Ex. 3.)

Although school began on August 23, 2994, Brewster was hired late and did not begin teaching until September 6, 1994. Brewster taught science to the so-called "X" track at Will Rogers. The X track consisted of students in grades 4, 5, and 6. Different teachers taught different subjects to the X track students.

Appendix B

Brewster describes the X track students as "notoriously difficult students with respect to discipline." Brewster asserts that at the time of his job interview with Furuno on August 31, 1994, Furuno told him that he was experiencing many discipline problems with the X track students. (Brewster Decl. at 4.) In addition, the students in the cluster spoke English "with varying, degrees of skill and comfort; as a result, the cluster was part of the Will Rogers' English Language Development program." (Furuno Decl. at 1-2.)

Brewster became involved in the Lynwood Teachers Association ("Union") as a grievance representative soon after beginning his employment at Will Rogers, and in the middle of October 1994, Brewster informed Furuno of his Union activity.[1] Between October and December of 1994, Brewster filed several grievances relating to a number of issues at various schools in the District.

In October and November of 1994, Brewster presented three allegedly minor grievances to Furuno.[2] In early November, Brewster filed a grievance on behalf of Leslie Herschler, another teacher at Will Rogers, alleging that Furuno's written reprimand to Herschler violated the District's Collective Bargaining

1. Furuno's declaration states that he was pleased that Brewster would he active in the Union, and that he himself had served as a grievance representative with the Union when he was a classroom teacher. (Furuno Decl. 3:26-4:6.)

2. Defendants assert that the first grievance that Brewster filed was on behalf of Leslie Herschler, who asserted that his class had one too many students, allegedly in violation of the District's collective bargaining agreement. However, Herschler filed this grievance on his own — Brewster did not file the grievance on Herschler's behalf. (Brewster Decl. at 14.)

Agreement ("Bargaining Agreement"). Furuno had issued the reprimand letter because Herschler had yelled at one of his student's parent, using profanity, and generally conducting himself in an unprofessional manner after the parent upset him at a parent-teacher conference, Furuno denied the grievance. (Furuno Decl. at Exs. 12 & 13.)

Later that month, Brewster filed identical grievances on behalf of himself and Herschler alleging that Will Rogers had violated the Bargaining Agreement by not giving the two teachers a day of moving time when their classroom locations were changed. Furuno denied both grievances, stating that it was the school's practice not to allow a moving day for teachers in roving assignments, which both men had. (Furuno Decl. 11:3-18.)

In all, Brewster filed the following grievances: (1) against Jenkins on behalf of a teacher from a school other than Will Rogers when Jenkins allegedly directed the business office — without approval from the Board of Education — to garnish the teacher's wages because the District had overpaid the teacher; (2) against the District on behalf of several teachers because the teachers did not have air conditioners in their classrooms, allegedly in violation of the Bargaining Agreement; (3) against the District on behalf of the Union because of unilateral decisions made by administrators at three District schools regarding the curriculum; (4) against Furuno on behalf of Herschler and Brewster because the two teachers were not permitted the moving day discussed above; (5) against Furuno on behalf of Herschler because of Furuno's disciplinary action and letter of reprimand; (6) against certain District administrators on behalf of the Union because of the failure of the administrators to implement state mandated discipline

policies. (Brewster Decl. at 12-14.) Furuno stated in his declaration that he was not aware of Brewster's Union activities at any site other than Will Rogers.

Once Brewster began working at Will Rogers, Defendants assert that Furuno immediately recognized that Brewster was unable or unwilling to relate to his students and their needs. Beginning on September 13, 1994, Defendants assert that Brewster began referring "unusually" large numbers of students to the principal's office. Defendants assert that during the month of September, Brewster referred 20 students, allegedly more than any other teacher at Will Rogers, to the principal's office.

Defendants also assert that parents and other employees began expressing concerns about Brewster's classroom management skills to Furuno. (Furuno Decl. at 3.) Furuno therefore made suggestions to Brewster on how he could improve those skills. (Furuno Decl. at 2-3, Ex. 1.)

Defendants assert that Brewster's classroom management problems continued in October, when he referred 19 students to the principal's office. Defendants also assert that during October, parents began requesting to visit Brewster's classroom in order to monitor his control and discipline. (Furuno Decl. at 3.)

Furuno stated in his declaration that by October of 1994 he had begun to think that he had erred in hiring Brewster and that he would have to consider recommending Brewster's nonreeleftion for the following school year. (Furuno Decl. at 3.) Defendants assert that Furuno had concluded by late November of 1994 that he would have to recommend Brewster's nonreelection. (Furuno Decl. at 4.) Defendants assert that this

conclusion was based on Furuno's personal observations of Brewster's performance and information from students, parents, staff, and other teachers. (*Id.*)

In particular, Furuno allegedly believed that Brewster was unable to develop a good working relationship with either his students or some of the other teachers with whom he worked. Brewster's inability to maintain adequate classroom control resulted in the "unusually large number" of students that he referred to the principal's office. (Furuno Decl. at 4, Ex. 1.)

Defendants support Furuno's statements with the declaration of Susan Taxter, one of Brewster's co-workers. Taxter stated that she was also concerned with Brewster's performance.

On November 28, 1994, Brewster met with Clarke, the District Superintendent, to request that his grievances against Furuno he expedited. Brewster also stated that he was concerned that the class attendance records were being falsified by the attendance clerk in order to increase "Average Daily Attendance" ("ADA"). However, Clarke allegedly told Brewster that changing attendance records was very important because they affect ADA and therefore the amount of federal funding the school received, (Brewster Decl. at 14.) After this meeting, Brewster did not hear anything more about his request for an expedited hearing on the grievances against Furuno. (*Id.*)

Prior to his employment, Brewster was informed by the District's Personnel Office that the District needed verification of Brewster's claimed experience. On December 5, 1994, Brewster received a letter from Clarke stating that the District had verified only three years of his experience and that if

Brewster did not provide verification for the other years by December 9, 1994, Brewster's salary would be reduced retroactive to September 6, 1994. Defendants contend that despite the District's numerous requests, Brewster only provided verification for three years of teaching experience. However, it appears that Brewster did provide verification of the information on his application, but Will Rogers only counted classroom teaching in grades kindergarten through twelfth as "experience", i.e., it did not count Brewster's administrative and college level experience as "experience." (Salazar Decl. at 3.) On December 27, 1994, Brewster received a letter dated December 2, 1994 and postmarked December 23, 1994 reducing his salary. The letter stated that the reduction would be effective retroactive to September 6, 1994.

On December 6, 1994, Brewster confronted the staff at Will Rogers with errors that had been made in attendance accounting. Furuno asserts that he investigated the alleged errors and found Brewster's claim to be meritless. Defendants assert that the 1994-95 audit of the District's attendance records include an audit of the attendance records at Will Rogers and the audit revealed no deficiencies at the school. (Islam Decl. at 2, Exs. I & 2.)

Furuno conducted an observation of Brewster's classroom on December 14, 1994. Brewster asserts that Furuno told him that everything was fine with his class. (Brewster Decl. at 8.) Brewster asked Furuno whether he would be giving him a written review, and Furuno said he would when he was able to "get around to it." However, in spite of the fact, that Furuno took notes when he observed Brewster, Furuno never submitted a formal evaluation. (Brewster Decl. at 8.)

Appendix B

Furuno claims that he informed Brewster at some point prior to December 23, 1994 that he would be recommending Brewster's nonreelection. Brewster, however, asserts that the first time he heard that Furuno would be recommending him for nonreelection was in a January 23, 1995 letter from Furuno. (Brewster Decl. at 16.)

Furuno formally recommended Brewster's nonreelection to Dr. Jenkins, Assistant Superintendent for Personnel Services, in January of 1995. Because the District has attempted to decentralize decision-making to the greatest extent possible (because the site administrators typically know best what their schools require), the decision to terminate Brewster was Furuno's decision alone. (Clarke Decl. at 2; Jenkins Decl. at 3.) Absent Furuno's recommendation, Brewster would not have been nonreelected. (Clarke Decl. at 2; Jenkins Decl. at 3.)

On February 26, 1995, Brewster addressed the Board of Education in order to discuss his nonreelection and salary modification, alleging that the Defendants were retaliating against him for his protected union activities. However, the Board voted to nonreelect Brewster. (Jenkins Decl. at 4, Exs. 7 & 8.)

During discovery, Brewster examined documents at the District's office on October 8, 1996. Brewster alleges that when the District's attorney left the office, he took a box of documents with him after telling Brewster that "this is stuff you can't have." (Brewster Decl. at 17.) While looking through documents that the District had produced, Brewster alleges that he found handwritten responses from Furuno to Brewster's first set of interrogatories and "jot-it-notes" from Jenkins, as well as investigative reports on Brewster, and discipline reports and

referrals. After Brewster tagged these documents for reproduction, the District's law clerk made a telephone call, after which she told Brewster that he could not look through the box any longer and removed tags from the items that he had marked. (Brewster Decl. at 17.).[3]

Brewster alleges that he made a verbatim note of one of Furuno's handwritten responses to interrogatories. Furuno allegedly said, "in sum and substance," that "I talked to Jenkins and she said not to give him any evaluation as that would make it messy." (Brewster Decl. at 18 and Ex. 63.) Furuno also allegedly stated that he had reviewed the ADA reports in August and while some changes had been made he did not think they should he considered a falsification. (Brewster Decl. at 18 and Ex. 64.)

---

3. Some of the documents that Brewster found during discovery are documents that ordinarily are protected by the attorney-client privilege (the privilege would be a federal privilege in this case because the evidence is relevant to federal questions). When otherwise privileged documents are inadvertently disclosed, the documents maintain their privilege if the party seeking to assert the privilege made reasonable efforts to protect and preserve the privilege. *See, e.g., Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179, 183 (N.D. Cal. 1990). When evaluating the privilege holder's efforts, important factors include: the reasonableness of the precautions taken to prevent inadvertent disclosure; the promptness of the holder's attempt to correct the error; the scope of the discovery; the extent of the disclosure; and fairness. *See id.* Here, however, Defendants have failed to discuss the reasonableness of the precautions that they took to prevent inadvertent disclosures or any other factor bearing upon the analysis. Indeed, Defendants have failed to establish that all of these materials are even privileged (e.g., jot-it notes from Jenkins and disciplinary referrals). However, the Court has not relied upon this material, and will reserve ruling on the propriety of this evidence.

Appendix B

Brewster returned to work after the X track inter-session on March 6, 1995, but soon took a nonindustrial illness leave for the remainder of the school year.

II. Discussion

A. *Brewster's First Amendment Claim.*

Brewster asserts that he was nonreelected in retaliation for exercising his First Amendment free speech rights.

It is well established that an employee does not give up his or her First Amendment right to comment upon matters of public concern simply by accepting employment with a governmental entity. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968). However, the Supreme Court has recognized that the State has a legitimate interest as an employer in regulating the speech of its employees. *See, e.g., Connick v. Myers*, 461 U.S. 138, 140 (1983). The objective of the law is to arrive "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

Only speech on "matters of public concern" is protected in the government employee context. *Connick*, 461 U.S. at 143. The rationale for this limitation is that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

Whether an issue is a "matter of public concern" is an issue of law. *See id.*, at 148, n. 7.

In *Connick*, the plaintiff, an assistant district attorney, was informed that she would be reassigned by the District Attorney to a different section of the criminal court. The plaintiff opposed this transfer and responded by circulating a questionnaire to her co-workers asking their opinions on several issues, including the office transfer policy, office morale, whether the employees felt the need for a grievance committee, and whether the employees felt pressured to work on political campaigns. *Id.*, at 141.

The Court held that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. The Court held that the plaintiff's questions regarding the transfer policy, morale, and the need for a grievance committee were not "matters of public concern" but were "more extensions of [the plaintiff's] dispute over her transfer." *Id.* at 148. The Court noted that the plaintiff had not attempted to inform the public that the D.A.'s office was improperly discharging its governmental duties. Nor had the plaintiff sought to bring to light any actual or potential wrongdoing or breach of public trust by the D.A. "Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo." *Id.* The Court held that the political campaign issue was the only matter of public concern in the plaintiff's questionnaire.

In *Havekost v. United States Dept. of the Navy*, 925 F.2d 316 (9th Cir. 1991), the plaintiff was a grocery bagger at a

naval commissary. The plaintiff and his fellow workers were dissatisfied with recent changes at the commissary regarding dress code, shift changes, etc. Therefore, the plaintiff circulated a petition seeking to fire the head bagger, whom the plaintiff and the other baggers held responsible for the new rules. As a consequence of this action, the plaintiff's bagger's license was revoked.[4] *Id.* at 317.

The court of appeals held that the plaintiff's speech was not on a matter of public concern and thus the revocation was not unconstitutional. *Id.* at 318-19. The court held that the dispute before it, like the dispute in *Connick* was "nothing more than a workplace grievance." *Id.* at 318. The issues raised were not " 'issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government.' " *Id.* at 318 (quoting *McKinley*, 705 F.2d 1110, 1114 (9th Cir. 1983)) .

Even if a plaintiff establishes that his or her speech was on a matter of public concern, the court must consider the government's legitimate interest in " 'promot[ing] efficiency and integrity in the discharge of official duties, and to maintain[ing] proper discipline in the public service.' " *Connick*, 461 U.S. at 151 (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882) .

When considering the government's interest in the proper functioning of the workplace, courts must consider the manner,

4. The plaintiff was not technically an employee; rather the plaintiff was licensed by the Navy to work as a bagger for tips and the Navy revoked the plaintiff's license because of his petition. The court of appeals analyzed the revocation under the *Pickering-Connick* employee-employer framework.

time, and place in which the disputed speech occurs. *Id.* at 152. In *Connick*, the court found that the plaintiff's question about employees feeling pressured to work on political campaigns was a matter of public interest but that the manner in which the plaintiff executed her survey disrupted the D.A.'s office and impeded her ability to perform her job responsibilities. Indeed, one of her supervisors characterized the plaintiff's conduct as causing a "mini-insurrection." *Connick*, 461 U.S, at 151. Therefore, the Court held that her employer could constitutionally terminate her because of her speech, even though it was on a matter of public concern. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-52. The Court noted, however, that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved matters of public concern." *Id.*, at 152.

The Court also found the context in which the dispute arose to be significant. *Id.* In *Connick*, the plaintiff did not distribute the questionnaire out of mere academic interest; rather, she circulated it on "the heels of the transfer notice." *Id.*

Once a plaintiff establishes that his or her speech is constitutionally protected, the plaintiff must still show that the conduct was a "substantial factor," i.e., a "motivating factor," in the employer's decision making. *Mt. Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Once the plaintiff has made this showing, the employer is entitled to prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Id.*, The employer is not liable if it would

have terminated the employee even without the protected activity because any other rule would put the employee who engages in protected activity in a better position than he or she would otherwise have occupied. *Id.* at 285-86.

1. *Brewster's allegations concerning attendance accounting were matters of public concern.*

Brewster argues that his Union activities are protected. However, the grievances that Brewster filed — particularly the ones that Furuno knew about — did not concern issues that would matter to the public. The grievances were matters of purely personal concern to the aggrieved teacher. The fact that the grievances were not of purely personal concern to Brewster does not change this conclusion, However, Brewster's allegations concerning Will Rogers' ADA records is unquestionably a matter of public concern because the ADA records determine the amount of federal funding that the school received.

Defendants argue that viewed in context, Brewster's claims regarding the ADA records lose their constitutional protection. Defendants argue that even if Brewster's claims were matters of public concern, they fail the balancing test regulating the interests of the teacher as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Defendants allege that Brewster's allegations concerning attendance accounting were intended (1) to disrupt working relationships at Will Rogers and (2) to cover up his own deficiencies.[5]

---

5. Brewster allegedly failed to turn in his attendance sheets, on a regular basis, his attendance forms were not very accurate, and the forms were not neatly done. (Furuno Decl. at 12; Carbajal Decl. at 2.)

Appendix B

The first deficiency in Defendants' argument is that courts undertake this balancing when the plaintiff has been discharged because of his or her First Amendment rights. Here, Defendants contend that Brewster's speech was not a factor in Furuno's decision to recommend Brewster's nonreelection. This is not a case like *Connick*, where the plaintiff was fired because her speech disrupted the office. Here, Brewster's nonreelection was allegedly based on merit.

The other flaw in Defendants' argument is that the "disruption" complained of is minor. Defendants have submitted the declaration of Ida Carbajal, the office person in charge of attendance, who stated that Brewster's allegations that she had falsified or intentionally made errors in attendance accounting "was particularly hurtful since he had ignored our efforts to get his assistance in that process. His allegations proved to me that I could not trust him." (Carbajal Decl. at 2.)

Carbajal's "hurt feelings" do not remove Brewster's speech from the protection of the First Amendment. Brewster's allegations concerning attendance accounting can hardly be described as a mini-insurrection, the noun which characterized the disruption caused by the *Connick* plaintiff's actions. Moreover, anytime an employee accuses his employer or a co-worker of wrongdoing, feelings are bound to be hurt at least to some degree.

Defendants argue that taken in context, Brewster's allegations can he seen to be a mere cover for his own inadequacies in attendance taking. However, Brewster has submitted the declaration of Joanne Perkins, who was the head of the Union when Brewster taught at Will Rogers, who stated that several teachers from her school site approached her stating

that hey had received their attendance books back only to find that they had been altered by adding the names of students to their classes who were not actually in their classes. (Perkins Decl. at 2.)[6]

2. *Whether Brewster's speech was a motivating factor in the decision not to reelect Brewster is a question of fact.*

Defendants argue that even if Brewster's speech was protected, Brewster has failed to present evidence that would enable a reasonable trier of fact to find that his protected conduct was a substantial factor in Defendants' decision to nonreelect Brewster.[7] Based on the analysis above, the issue is whether Brewster's allegations regarding attendance accounting motivated Furuno to recommend Brewster's nonreelection.[8]

---

6. Defendants have objected to this portion of Perkins's declaration as irrelevant hearsay. However, the statements are relevant to Brewster's motivation and are not hearsay for the same reason. Whether the school actually falsified records is not dispositive of Brewster's claims.

7. The Court rejects Defendants' argument that Brewster's decision not to pursue his state administrative remedy shows a lack of faith in his claims: he simply chose a federal court forum in which to resolve this dispute. The Court likewise rejects Defendants' suggestion that the Court should ignore the Supreme Court's holding in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and require exhaustion of administrative remedies for Brewster's claims merely because exhaustion "makes tremendous sense." (Motion at 21, n. 1.)

8. Defendants have submitted evidence, which Brewster has not disputed, that establishes that although the Board of Education had to approve of Brewster's nonreelection, the decision to nonreelect Brewster effectively was Furuno's alone.

Appendix B

Defendants assert that Brewster was nonreelected because he was a poor teacher who could not control his classroom. During the month of September, Defendants assert that Brewster referred 20 students, allegedly more than any other teacher at Will Rogers, to the principal's office.

However, as stated in the Background portion of this order, at the time of Brewster's job interview with Furuno on August 31, 1994, Furuno told Brewster that he was experiencing many discipline problems with the X track students. (Brewster Decl. at 4.) In addition, Brewster asserts that 24 of the students he referred to Furuno were referred for conduct that occurred outside of the classroom (e.g., skipping class, destroying school property, and fighting in the school yard) (Brewster Decl. at 5.)

Certainly the declarations of Furuno and Taxter are some evidence that Brewster was not, in their opinions, a good teacher. On the other side of the equation, however, are the following: (1) Brewster asserted in his declaration that he was never informed of any inadequacies in his teaching ability prior to being informed that Furuno would not be recommending him, for reelection; (2) the fact that Furuno allegedly stated that he was having discipline problems with the X track; and (3) the lack of any formal evaluation indicating that Brewster was performing at what Defendants now assert was a "grossly inadequate" level. The Court finds that there is a genuine issue of fact as to whether Brewster's protected activity was a motivating factor in Furuno's decision to nonreelect him.

3. *Whether Brewster would have been terminated even without his speech on attendance accounting is a question of fact.*

Finally, Defendants argue that they would have nonreelected Brewster notwithstanding his speech because Brewster was an inadequate teacher. However, this is an inherently factual question that cannot be resolved on summary judgment given the facts presented by this litigation.

B. *Brewster's Due Process Claim.*

Brewster asserts that Defendants violated his due process rights when they changed his placement on the salary schedule and recouped his alleged salary overpayments.

Defendants assert that Brewster was not denied due process of law because (1) he had no property interest in his placement on the salary schedule because his placement was incorrect; (2) the District did not recoup his salary overpayments, and (3) he was not denied due process even if he had a property interest in his original salary.

1. *Property interest.*

In order to establish a due process violation, the plaintiff must establish a property interest that the defendant took without due process of the law. A "property interest" only exists in something to which the plaintiff has "a legitimate claim of entitlement." *Board of Regents v. Roth*, 408 U.S. at 507 (1972).

Defendants argue that under *Roth*, Brewster's due process claim fails because he had no legitimate interest in an incorrect

placement on the salary schedule. Therefore, the first issue is whether there is a genuine issue of material fact with regard to whether Brewster's original placement on the salary schedule was proper.

Section 45028 of the California Education Code provides that teachers shall be placed on the salary schedule based on a uniform allowance for years of training and experience. School districts are free to define experience for purposes of their salary schedules so long as they apply their definition of experience uniformly. *See Mayer v. Board of Trustees of the Los Alamitos School Dist.*, 106 Cal. App. 3d 476, 487 (1980).

Here, Defendants assert that the District defines experience to mean kindergarten through twelfth grade teaching experience. Administrative and college level experience are excluded from the definition. (Jenkins Decl, at 3.) Defendants argue that the District could not have given Brewster credit for his non-teaching experience without violating the uniformity requirement of Section 45028 of the Education Code.

However, as stated in the Background portion of this Order, Brewster's salary originally was set based on the experience listed in Brewster's application, which was not misleading. Brewster's application listed his experience as both an administrator and a college professor, as well as a classroom teacher. Indeed, his experience was predominantly administrative. This fact alone calls into question Defendants' assertion that the District had an unwritten policy of only giving experience credit for elementary school teaching.

In addition, the 1994-95 Collective Bargaining Agreement states that "teachers in the critical areas of . . . science . . . shall

be placed on the Teachers Salary Schedule without restriction with full credit given for all prior experience, providing the experience was full time with a valid teaching credential. The District will make the final determination of initial placement on the salary schedule." At oral argument, Defendants asserted that this provision only applied to departmentalized teachers, i.e., high school teachers. However, it appears that the X track at Will Rogers was taught on a departmentalized basis. (Brewster Supplemental Decl., Exs. 1-11.) Accordingly, the Court finds, for the purposes of this motion, that the District properly placed Brewster on the salary schedule when Brewster started working at Will Rogers in September.

Brewster has not presented evidence of other teachers who received credit for experience other than as elementary school teachers. However, the Court finds that Brewster's original placement, which was not based on any false or misleading information, and the operative collective bargaining agreement suffice to establish a genuine issue of material fact concerning whether Brewster's original placement on the salary schedule was proper. If the placement was proper, Brewster had a protectable property interest in the salary.

2. *Recoupment of alleged salary overpayments.*

Defendants argue that the District made no effort to recoup any overpayments from Brewster. Defendants argue that Brewster's salary was lower than would be expected with simply a prospective change in his placement on the salary schedule for two reasons. First, when an employee is on non-accumulated leave, the District is required by law to deduct the cost of a substitute teacher from the employee's salary, which the District did during Brewster's leave of absence

between March 7, 1995 and June 30, 1995. Second, Brewster began working for the District on September 6, while the school year started on August 26, and therefore the total salary that Brewster could earn was limited to a pro-rata amount of what an employee who had worked the full year would have received. This second limitation resulted in Brewster's June salary of zero. Defendants assert that to the extent that there was any miscalculation of Brewster's total salary for the year, the miscalculation was merely an administrative error.

However, the salary analysis Brewster presented to the Court took into account both the payments to the substitute teachers and Brewster's September 6 start, Brewster's calculations show that he was paid more than $4,000 less than he should have been paid. In addition, when the District calculated the total salary for which Brewster was eligible (the pro-rata amount based on Brewster's late starting date), the District used the reduced salary. This resulted in the District not paying Brewster at the end of the year to account for his alleged overpayment earlier in the year. In other words, the District effectively recouped at least some of the original overpayment by not paying Brewster wages that he otherwise would have been entitled to in June. Moreover, all of the letters that Brewster received regarding his salary stated that his salary would be reduced *retroactive* to *September 6, 1994*. Thus, for the purposes of this motion, the Court finds that the District recouped the alleged salary overpayments.

3. *Due process.*

"[O]nce it is determined that the Due Process Clause applies, 'the question romains what process is due.' ", *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 541 (1986) (quoting

Appendix B

Morrisey v. Brewer, 408 U.S. 471, 481 (1972) The "root requirement" of the Due Process Clause in a hearing held prior to deprivation of a significant property interest, although in certain circumstances a post-deprivation hearing is sufficient. *See id.* at 542 & 542, n. 7.

The required hearing is not necessarily a formal evidentiary hearing. In *Loudermill*, the Court held that the plaintiff, a tenured government employee, was accorded due process in his termination. The Court held that the defendant's pretermination hearing needed to provide only "notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. The plaintiff's informal pretermination hearing, "coupled with post-termination administrative procedures as provided by [state statute]," provided the plaintiff all of the process that he was due. *Id.* at 547-48.

Here, the Board reduced Brewster's salary from $48,364 to $36,361 on December 13, 1994. Prior to that time, Brewster was not afforded an opportunity to he heard on his claim that his placement on the salary schedule was correct.[9] Defendants assert that Brewster was not deprived of due process because he was notified that he needed to provide verification of his experience, but that Brewster failed to avail himself of this opportunity. However, this "opportunity" is illusory, for Defendants were asking for verification that they knew or should have known did not exist.

---

9. Brewster and his Union representative did not meet with Dr. Jenkins until December 15, 1994, two days after the Board changed Brewster's salary.

The Court need not address the precise amount of process that Brewster was due, because the process due, albeit limited, was not provided. With regard to Brewster's claim that Defendants recouped his alleged overpayments, the Court finds an even greater lack of process; indeed, Defendants deny that they even recouped any wages.

Defendants cite *Parratt v. Taylor*, 451 U.S. 527 (1981), for the proposition that Brewster cannot assert a claim of procedural due process when he could have asserted a state law claim (e.g., breach of contract). However, in *Parratt*, the court merely found that when the plaintiff's loss was not the result of an established state procedure, but rather was the result of a "random and unauthorized" act of a state employee beyond the state's control, the Constitution did not require a pro-deprivation hearing. *Id.* at 541. The *Parratt* post-deprivation hearing satisfies due process in cases of "random and unauthorized" acts because the state administrative machinery cannot learn of the deprivation until after it occurs. *See Knudson v. City of Ellensburg*, 832 F.2d 1142 (9th Cir. 1987); *see also Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 333-34, n. 17 (9th Cir. 1995) (stating that *Parratt* does not apply when the deprivation at issue occurred pursuant to "deliberate and considered" decision making).

In *Parratt*, the plaintiff was a state prison inmate whose mail order hobby materials were lost when prison employees failed to follow normal procedures for handling mail packages. *Id.*, at 530. Because the tort remedies provided by the State of Nebraska were "sufficient to satisfy the requirements of due process," the Court held that the plaintiff had not alleged a due process violation. *Id.* at 537. The government conduct in *Parratt* was unintentional, although in *Hudson v. Palmer*, 468 U.S. 537

(1984), the Court extended the *Parratt* rule to include deprivations that while intentional were nonetheless "random and unauthorized" by the state. *Id.* at 532-33 (rejecting claim that prisoner's right to procedural due process was violated when prison guard intentionally destroyed certain items of the prisoner's noncontraband personal property during a "shakedown" search)

C. *Defendants Contend That They Are Entitled To Qualified Immunity.*

Government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlowe v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Undoubtedly, the right to be free from retaliation for the exercise of First Amendment rights, even in the context of a government employee, has been "clearly established." However, the Court must consider whether the contours of that right are sufficiently clear that a reasonable official would understand that what he is doing violates the right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Here, in order for Brewster to prevail at trial, the jury must find that Furuno effected Brewster's nonreelection because of Brewster's allegations regarding attendance accounting and that Brewster's teaching performance was not sufficiently deficient such that Furuno would have recommended his nonreelection even without the attendance dispute. If the jury ultimately finds these facts to be true, then Furuno's conduct is conduct that a "reasonable official" would have known was unconstitutional. Therefore, Defendants would not have qualified immunity.

Similarly, if the jury finds that Brewster's placement or the salary schedule was proper and that Defendants recouped Brewster's alleged salary overpayments, then changing his placement and recouping his wages without any form of pre-termination hearing was improper. *Cf., e.g., Williams v. Texas Tech University Health Sciences Center*, 6 F.3d 290 (9th Cir. 1993) (finding procedural due process met by notice and opportunity to respond in salary reduction case), *cert. denied sub nom., Williams v. Saltzstein*, 510 U.S. 1194 (1994); *Brasslett v. Cota*, 761 F.2d 827, 836 (1st Cir. 1985) (finding due process satisfied when notice and opportunity to explain plaintiff's version of the facts at a one hour meeting between the plaintiff-employee and the plaintiff's supervisor was sufficient pre-termination process); *Kelly v. Smith*, 764 F.2d 1412, 1414 (11th Cir. 1985) (finding due process satisfied where defendant gave plaintiff notice of charge and opportunity to respond at a single meeting) .

D. *Defendants Assert That Brewster Cannot Maintain His Cause of Action Against The Defendant Board Members For Failure To Train In Their Individual Capacities.*

The Board of Education and the Board members in their official capacity have been dismissed from this action based on their 11th Amendment immunity. Defendants now move for summary judgment, asserting that Brewster has presented no evidence that the Board's failure to train or supervise resulted in the violation of Brewster's rights. The Court finds this argument convincing and grants Defendants' motion with regard to this issue.[10]

---

10. Defendants also contend that the individual board members cannot be held liable for failure to train because Brewster has not alleged

(Cont'd)

Appendix B

IT IS SO ORDERED

DATED: January 9, 1997

s/ Dean D. Pregerson
Dean D. Pregerson
United States District Judge

(Cont'd)
any activity by any of the members in any individual capacity. The individual Board members have no authority to act individually, they can only act when voting as an entity. (Clarke Decl. at 3.) However, Defendants cited no authority for their argument. Moreover, suits against government officials in the officials' *individual capacities do no violate the 11th Amendment even though the individuals only have authority to act in their official capacity*. The same reasoning that permits suits in these cases would permit Brewster to assert his claim if he had presented evidence sufficient to withstand summary Judgment on the issue.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED AUGUST 4, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-55203
D.C. No. CV-95-05855-DDP

ARTHUR J. BREWSTER,

Plaintiff-Appellee,

v.

THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, AUDREY M. CLARKE, as an individual and in her official capacity, ALTHEA L. JENKINS, as an individual and in her official capacity, GARY D. FURUNO, as an individual and in his official capacity, RICHARD ARMSTRONG, as an individual and in his official capacity, LAURA M. BYRD, as an individual and in her official capacity, RACHEL CHAVEZ, as an individual and in her official capacity, CYNTHIA GREEN-GETER, as an individual and in her official capacity, THELMA CALVIN-WILLIAMS, as an individual and in her official capacity, and DOES 1-50, inclusive,

Defendants-Appellants.

ORDER

Before: **FARRIS, O'SCANNLAIN,** and **FERNANDEZ,** Circuit Judges.

Appendix C

Appellants The Board of Education of the Lynwood Unified School District, et al., are requested to file a response to Appellee's petition for rehearing and suggestion for rehearing en banc. Appellants shall file 40 copies of their response within 21 days of the date of this order.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 13, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-55203
D.C. No. CV-95-05855-DDP

ARTHUR J. BREWSTER,

Plaintiff-Appellee,

v.

THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, AUDREY M. CLARKE, as an individual and in her official capacity, ALTHEA L. JENKINS, as an individual and in her official capacity, GARY D. FURUNO, as an individual and in his official capacity, RICHARD ARMSTRONG, as an individual and in his official capacity, LAURA M. BYRD, as an individual and in her official capacity, RACHEL CHAVEZ, as an individual and in her official capacity, CYNTHIA GREEN-GETER, as an individual and in her official capacity, THELMA CALVIN-WILLIAMS, as an individual and in her official capacity, and DOES 1-50, inclusive,

Defendants-Appellants.

ORDER

Before: **FARRIS, O'SCANNLAIN,** and **FERNANDEZ,** Circuit Judges.

Appendix D

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E — DECLARATION OF JOANNE L. PERKINS IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY FOR PARTIAL SUMMARY JUDGMENT DATED NOVEMBER 3, 1996 AND FILED NOVEMBER 19, 1996

FOSBINDER & FOSBINDER
Attorneys at Law
1723 Ocean Front Walk
Venice, California 90291
(310)396-1071/(310)841-5640

James E. Fosbinder #147801
Rhonda M. Fosbinder #172253
Fax: (310)450-3706

Attorney for: Arthur J. Brewster

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 95-5855 DDP (AJWx)

Arthur J. Brewster,

Plaintiff,

vs.

TEE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, et al.,

Defendant

Appendix E

DECLARATION OF JOANNE L. PERKINS IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY FOR PARTIAL SUMMARY JUDGMENT

I, JOANNE L. PERKINS, declare as follows:

1. If called upon to testify I could and would testify to the matters set forth below of my own personal knowledge.

2. I have been employed as a certificated teacher by the Lynwood Unified School District for over sixteen years.

3. I was President of the Lynwood Teachers Association all the time Dr. Brewster was employed by the Lynwood Unified School District.

4. During the fall of 1994, I appointed Dr. Brewster to serve as the Association's grievance representative as well as a member of the grievance committee.

5. I was present at the meeting with superintendent Clarke in late November of 1994 when Dr. Brewster discussed with Ms. Clarke the allegation that the district was filing false and fraudulent claim for A.D.A.

6. At that meeting superintendent Clarke took notes and said that she would get back to us. However, she did not get back to us.

7. I had several teachers from my school site approach me stating they had received their attendance books backs and they had been altered. Names of students had been added to their attendance books, students that had never been in the teacher's

classrooms were now on their attendance books. The attendance sheet for two months had been rewritten in someone else's handwriting. And the students — Those teachers had no idea where those students were. They refused to sign the attendance sheet because that is a legal document. And were told that if they didn't sign it, then the principal would sign it.

8. Their attendance books were not given back to them. I had Photostat copies, the teachers have copies. We turned them in to Wiley Jones at C.T.A. to take them to legal. And after about a month — no, two weeks, the attendance books were given back to the teachers. I thing we had one particular grade level had their attendance books changed. The teachers did not recognize the handwriting. They have no idea who did it.

9. Those teachers that refused to sign the altered attendance record stated they would not sign them because they were legal documents, and they were not going to risk losing their credential by signing an altered attendance record. The copies were given to C.T.A. They were supposed to go to legal and C.T.A. was supposed to have had a meeting with Dr. Jenkins regarding it.

10. Dr. Brewster consulted with me on each and every grievance that he filed as Association Grievance Representative. I agreed that everyone was legitimate and should be supported by the Association.

11. The issues underlining the grievances were very serious breaches of State Law, School Board Policies, Terms and Condition of employment set forth in the Collective Bargaining Agreement and the Lynwood Unified School District and the Education Code.

Appendix E

12. Failure on the part of the Lynwood Unified School District to redress the various grievances was a deliberate attempt on the part of the administration to emasculate the union.

13. The grievances filed by Dr. Brewster on behalf of the Association and individual unit members dealt with but were not limited to:

I. Violation of the wage garnishment law
II. Denial of due process (both procedural & substantive)
III. Libel & slander
IV. Health & safety of students and teachers
V. Unilateral imposition of sanction & discipline
VI. Academic Freedom
VII. Freedom of Speech

14. Although Dr. Brewster was listed as the grievant on one of the grievances, each and every grievance dealt with issues of great public concern.

15. I knew Mr. Furuno for many years as principal of Washington Elementary School where I am a teacher. Whenever students were sent to the office for referrals they were sent back or the principal talked to the student or students involved. The consensus among my colleagues was why bother sending them if nothing is going to get done. Fewer students were being suspended and Mr. Furuno became less and less willing to spend time with the problem child.

16. In all my dealings with and observations of Dr. Brewster he has always behaved with integrity and professionalism.

Appendix E

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Fe Springs, California on November 3rd, 1996.

s/ Joanne L. Perkins
Joanne L. Perkins

(2)

Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

No. 98-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ARTHUR J. BREWSTER,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, AUDREY M. CLARKE, as an individual and in her official capacity, ALTHEA L. JENKINS, as an individual and in her official capacity, GARY D. FURUNO, as an individual and in his official capacity, RICHARD ARMSTRONG, as an individual and in his official capacity, LAURA M. BYRD, as an individual and in her official capacity, RACHEL CHAVEZ, as an individual and in her official capacity, CYNTHIA GREEN-GETER, as an individual and in her official capacity, THELMA CALVIN-WILLIAMS, as an individual and in her official capacity, and DOES 1-50, INCLUSIVE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

WARREN S. KINSLER
Counsel of Record
ATKINSON, ANDELSON,
LOYA, RUUD & ROMO
Attorneys for Respondents
13304 East Alondra Boulevard
Cerritos, California 90703-2263
(562) 404-4444

151371

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

13 pp

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Ninth Circuit correctly determined that Respondents are entitled to qualified immunity against Petitioner's claim that he suffered retaliation in his employment as a public school teacher for engaging in work-related speech, where the speech in question was disruptive of close working relationships, false, and interfered with Petitioner's performance of his own duties, and where, in light of these considerations, Petitioner's speech did not clearly enjoy any First Amendment protection under the particularized, factually-sensitive balancing of factors first articulated by this Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	3
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 4, 6

Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986), *cert. denied*, 479 U.S. 848, 107 S. Ct. 172, 93 L. Ed. 2d 109 (1986) 7

Board of Educ. of the Round Valley Unified Sch. Dist. v. Round Valley Teachers Ass'n, 13 Cal. 4th 269, 52 Cal. Rptr. 2d 115 (1996) 1

Connick v. Meyers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1984) 4, 5

Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir. 1989) 6

Di Meglio v. Haines, 45 F.3d 790 (4th Cir. 1995) 6

Guerico v. Brody, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, 500 U.S. 904, 111 S. Ct. 1681, 114 L. Ed. 2d 76 (1991) 6

Harlow v. Fitzgerald, 457 U.S. 500, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). 4

Kincade v. City of Blue Springs, 64 F.3d 389 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166, 116 S. Ct. 1565, 134 L. Ed. 2d 665 (1996) 6

Cited Authorities

Page

Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (1991) (en banc), *cert. denied*, 502 U.S. 906, 112 S. Ct. 297, 116 L. Ed. 2d 241 (1991) 6

Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021 (5th Cir. 1988) 6, 7

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), *cert. denied*, 510 U.S. 1024, 114 S. Ct. 634, 126 L. Ed. 2d 593 (1993) 6

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) ..... *passim*

Waters v. Churchill, 511 U.S. 661, 673, 114 S. Ct. 1878 128 L. Ed. 2d 686 (1994) 5

Statutes:

California Education Code Section 44929.21 1

42 U.S.C. § 1983 ..... 2, 4

United States Constitution:

First Amendment ..... *passim*

STATEMENT OF THE CASE

The Lynwood Unified School District (hereinafter "District") hired Petitioner Arthur J. Brewster as a probationary teacher at Will Rogers Elementary School in or about September of 1994. (CR 24, ER7, Decl. of Furuno 2:10-25.)[1] Pursuant to California Education Code Section 44929.21, California public school districts may choose not to retain, or "non-reelect," first- or second-year probationary teachers for the following school year by giving notice on or before March 15 of this decision. Probationary teachers have no right to continued employment, and are subject to non-reelection without cause, without a hearing, and without any statement of reasons. *Board of Educ. of the Round Valley Unified Sch. Dist. v. Round Valley Teachers Ass'n*, 13 Cal. 4th 269, 277-79, 52 Cal. Rptr. 2d 115, 120-21 (1996).

Shortly after Petitioner began teaching, Respondent Gary D. Furuno, Principal of Will Rogers Elementary, became aware of several deficiencies in Petitioner's teaching, based on his own observations, as well as on complaints from parents, teachers, and staff members. (CR 24, ER 7, Furuno 3:8-4:13.) On December 1, 1994, Furuno issued a memorandum to Petitioner describing specific deficiencies in Petitioner's job performance. (CR 36, ER 12, Plaintiff's Statement of Genuine Issues in Opposition to Motion for Summary Judgment, hereafter "SGI," ¶ 124.) On December 6, 1994, Petitioner alleged to Furuno for the first time that he (Petitioner) perceived that an error had been made in the calculation of daily attendance records for Petitioner's classroom. (CR24, ER7, Decl. of Furuno 11:24-12:3.) In fact, Petitioner had himself repeatedly failed to turn in his own attendance registers on a

---

1. Citations to the record will contain a reference to the Clerk's Record and to the Excerpts of Record, as well as the title of the document cited.

daily basis and to follow up on obtaining verifications of student absences, as is required of every teacher. Petitioner consistently failed to comply with these requirements of his job, despite repeated requests from clerical staff. Petitioner's attendance taking was not accurate or very neatly done. Furuno found that Petitioner's allegations and conduct in this regard were damaging to the morale of the clerical employees, disruptive of the close working relationship required between teacher and principal, and were an apparent attempt to cover up Petitioner's own performance deficiencies. (CR 24, ER 7, Furuno 12:4-16.)

Petitioner presented the attendance accounting issue to Furuno as one of error and not of fraud or falsification. (CR36, ER12, SGI ¶ 127.) Furuno responded by telling Petitioner that he would review his concerns with the school secretary to see whether, in fact, any errors had been made. Furuno reviewed each step in the attendance accounting process with the school secretary to make sure that there was no misunderstanding and that correct procedures were being followed. Furuno also reviewed Petitioner's classroom attendance register and found no errors in the calculation of attendance. (CR24, ER 7, Decl. of Furuno 12:17-28; CR36, ER 12, SGI ¶ 127.) A subsequent audit of the District's attendance records revealed no significant errors in attendance accounting procedures either at Will Rogers Elementary or within the District as a whole. (CR 28, ER 9, Decl. of Islam 2:9-18.)

On February 28, 1995, pursuant to Furuno's recommendation, the District's Board of Education voted to nonreelect Petitioner. Although Petitioner's nonreelection required Board action, the decision was effectively Furuno's alone. (Petitioner's Appendix B, p. 41a.)

Petitioner subsequently filed suit pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, that his First Amendment rights

were violated because his nonreelection was motivated by his speech regarding the attendance accounting issue, as well as by Petitioner's activities as a union grievance representative. Respondents, who deny that Petitioner's speech was a motivating factor in his nonreelection[2], moved for summary judgment on grounds of qualified immunity. The District Court for the Central District of California granted the motion in part and denied it in part, ruling that while Petitioner's activities as a union grievance representative did not constitute speech protected by the First Amendment, Petitioner's speech regarding attendance accounting was protected by the First Amendment as a matter of clearly established law. (Petitioner's Appendix B, pp. 47a-49a, 57a.) Respondents appealed the District Court's ruling insofar as it denied qualified immunity. The Court of Appeals for the Ninth Circuit reversed, and subsequently denied rehearing and rejected Petitioner's suggestion for rehearing en banc. (Petitioner's Appendix A, p. 32a; Petitioner's Appendix D, p. 63a.) The present petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

The Ninth Circuit correctly ruled that Respondents are entitled to qualified immunity because Petitioner's speech regarding alleged errors in attendance accounting was not protected by the First Amendment as a matter of clearly established law. Furthermore, the Ninth Circuit's holding is consistent with the decisions of this Court and the decisions of every sister Circuit that has specifically considered the issue of the application of the qualified immunity doctrine to claims of First Amendment retaliation in the public employment context. Therefore, the petition should be denied.

---

2. Respondents conceded for purposes of their appeal only that Plaintiff's speech on the attendance accounting issue was a motivating factor in his non-reelection. (*See* Petitioner's Appendix A, p. 11a.)

A public official is entitled to qualified immunity from personal liability under 42 U.S.C. § 1983 unless that official's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 500, 514, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Moreover, the law must be clearly established in a "particularized" sense. For the law to be clearly established to the point that qualified immunity does not apply, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

Public employees such as Petitioner have only limited First Amendment rights in the context of their employment. Only that speech which relates to matters of public concern is protected in the public employment context. *Connick v. Meyers*, 461 U.S. 138, 146-49, 103 S. Ct. 1684, 1690-91, 75 L. Ed. 2d 708 (1984). If the speech is on a matter of public concern, this Court requires a balancing of the

> interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,

in order to determine whether the First Amendment protects the speech. *Id.* at 142, 103 S. Ct. at 1687 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968)). The outcome of this balance turns largely on the precise context in which the speech at issue occurs, and "the states's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150, 103 S. Ct. at 1691-92.

In striking this balance, this Court has recognized that public officials retain

> wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.

Id., 461 U.S. at 151, 103 S. Ct. at 1692. Furthermore, this Court has held that public employers' "reasonable predictions of disruption" are entitled to substantial deference. *Waters v. Churchill*, 511 U.S. 661, 673, 114 S. Ct. 1878, 1887, 128 L. Ed. 2d 686 (1994).

Thus, as stated by the Ninth Circuit in its decision:

> whether or not [Petitioner] enjoyed a clearly established right to speak depends upon the sensitive *ad hoc* balancing that *Pickering* entails. The issue the court must decide is whether the outcome of the *Pickering* balance so clearly favored [Petitioner] that it would have been patently unreasonable for the school officials to conclude that the First Amendment did not protect his speech.

(Petitioner's Appendix A, p. 16a.) Weighing the relative interests of the District and of Petitioner in light of factors identified by courts that have applied the Pickering analysis, the Ninth Circuit properly concluded that, while there were considerations on both sides of the balance, numerous factors weighed in favor of the District's interest in taking action against Petitioner for the disruptive manner in which he raised the issue of the accuracy of the District's student attendance record keeping. These include Petitioner's disruption of

harmony among co-workers, the nature of the principal-teacher relationship, which Petitioner conceded is a close working relationship that requires trust and respect, the extent to which Petitioner's speech interfered with the fulfillment of his own duties, the fact that Petitioner's speech was directed to a colleague rather than to the public or the media, and the fact that Petitioner's allegations were ultimately determined to be false. In light of these factors, the Ninth Circuit concluded that Respondents were entitled to qualified immunity. (Petitioner's Appendix A, pp. 14a-20a.)

This determination is consistent with this Court's requirement that qualified immunity analysis be conducted in a "particularized" manner, with consideration given to the specific factual circumstances in which a violation of federal rights is alleged to have occurred. *Anderson*, *supra*. Additionally, the Ninth Circuit's decision is in accord with decisions addressing similar issues by the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. All of these circuits, like the Ninth Circuit, have recognized that the inherently fact-sensitive nature of the *Pickering* balance will often preclude a determination that an employee's speech was clearly protected by the First Amendment. *See Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166, 116 S. Ct. 1565, 134 L. Ed. 2d 665 (1996); *Di Meglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995); *O'Connor v. Steeves*, 994 F.2d 905, 917 n.11 (1st Cir. 1993), *cert. denied*, 510 U.S. 1024, 114 S. Ct. 634, 126 L. Ed. 2d 593 (1993); *Guerico v. Brody*, 911 F.2d 1179, 1183-85 (6th Cir. 1990), *cert. denied*, 500 U.S. 904, 111 S. Ct. 1681, 114 L. Ed. 2d 76 (1991); *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (1991) (en banc), *cert. denied*, 502 U.S. 906, 112 S. Ct. 297, 116 L. Ed. 2d 241 (1991); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989); *Noyola v. Texas*

Dep't of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986), *cert. denied*, 479 U.S. 848, 107 S. Ct. 172, 93 L. Ed. 2d 109 (1986).

Petitioner himself concedes that the Ninth Circuit employs an

> extremely fact-intensive balancing test [under which] the law of protected speech . . . can almost never become clearly established, because the specific facts of one situation will always differ slightly from the specific facts of any other situation.

(Petition at p. 8.) Given that this is so, there can be no question that Respondents are entitled to qualified immunity.

Petitioner argues that this Court should grant the writ because the Ninth Circuit improperly conducted the *Pickering* balancing and gave insufficient weight to the declaration of JoAnne Perkins. First, this Court's rules clearly provide that an asserted misapplication of a properly stated rule of law rarely constitutes grounds for granting a writ of certiorari, and Petitioner presents no argument in favor of departure from this general rule.

Second, the Perkins declaration does not tip the *Pickering* balance in Petitioner's favor. As noted above, it was Furuno who made the recommendation for Petitioner's nonreelection, and the District Court determined for purposes of summary judgment that the decision to nonreelect Petitioner was effectively Furuno's alone. Petitioner does not contend, and nothing in the record suggests, that Furuno had any awareness of the facts alleged in the Perkins declaration. Therefore, these facts are irrelevant to the question of whether Furuno reasonably

could have concluded that the First Amendment did not protect Petitioner's speech regarding the attendance records for the classes that Petitioner taught at Will Rogers Elementary. Third, even if the Perkins declaration did tip the *Pickering* balance in Petitioner's favor, this would go only to the merits of Petitioner's First Amendment claim and would not alter the outcome of the pertinent question of qualified immunity.

Petitioner, in urging this Court to grant the petition, inaccurately characterizes the effect of the Ninth Circuit's holding. Petitioner would have this Court believe that the Ninth Circuit's decision, if allowed to stand, would constitute a death knell for public employees' First Amendment rights. This is false. The Ninth Circuit's decision relates only to qualified immunity and has no effect on the liability of public employers. All that the Ninth Circuit has done is to ensure that individual public officials may continue to ensure the efficiency of the governmental enterprises for which they are responsible, including, where necessary, by taking action to discipline or terminate employees based on reasonable predictions of disruption, without fear of personal liability.

Where, as in this case, a public official is confronted with evidence that a public employee has falsely criticized colleagues and undermined close working relationships, all over a policy with which the employee himself has in the past failed to comply, that public official must be free to correct the problem. To require a public official to accurately predict how a court will balance the *Pickering* factors, viewing the situation after the fact, at the risk of personal financial peril, is to deny that public official the ability to manage [effectively] the employees under his supervision.

CONCLUSION

For all the foregoing reasons, Respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

WARREN S. KINSLER
Counsel of Record
ATKINSON, ANDELSON,
LOYA, RUUD & ROMO
Attorneys for Respondents
13304 East Alondra Boulevard
Cerritos, California 90703-2263
(562) 404-4444